

# OFFICIAL CODE OF GEORGIA ANNOTATED

---

## 2013 Supplement

Including Acts of the 2013 Regular Session of the General Assembly

---

*Prepared by*

The Code Revision Commission

The Office of Legislative Counsel

*and*

The Editorial Staff of LexisNexis®



Published Under Authority of the State of Georgia

---

## Volume 29A 1997 Edition

Title 41. Nuisances

Title 42. Penal Institutions

---

Including Annotations to the Georgia Reports  
and the Georgia Appeals Reports

---

**Place in Pocket of Corresponding Volume of  
Main Set**

---

LexisNexis®  
Charlottesville, Virginia

COPYRIGHT © 1998—2013

BY

THE STATE OF GEORGIA

---

All rights reserved.

ISBN 978-0-327-11074-3 (set)

ISBN 978-0-327-11586-1

5012030

## THIS SUPPLEMENT CONTAINS

### **Statutes:**

All laws specifically codified by the General Assembly of the State of Georgia through the 2013 Regular Session of the General Assembly.

### **Annotations of Judicial Decisions:**

Case annotations reflecting decisions posted to LexisNexis® through March 29, 2013. These annotations will appear in the following traditional reporter sources: Georgia Reports; Georgia Appeals Reports; Southeastern Reporter; Supreme Court Reporter; Federal Reporter; Federal Supplement; Federal Rules Decisions; Lawyers' Edition; United States Reports; and Bankruptcy Reporter.

### **Annotations of Attorney General Opinions:**

Constructions of the Official Code of Georgia Annotated, prior Codes of Georgia, Georgia Laws, the Constitution of Georgia, and the Constitution of the United States by the Attorney General of the State of Georgia posted to LexisNexis® through March 29, 2013.

### **Other Annotations:**

References to:

Emory Bankruptcy Developments Journal.  
Emory International Law Review.  
Emory Law Journal.  
Georgia Journal of International and Comparative Law.  
Georgia Law Review.  
Georgia State University Law Review.  
Mercer Law Review.  
Georgia State Bar Journal.  
Georgia Journal of Intellectual Property Law.  
American Jurisprudence, Second Edition.  
American Jurisprudence, Pleading and Practice.  
American Jurisprudence, Proof of Facts.  
American Jurisprudence, Trials.  
Corpus Juris Secundum.  
Uniform Laws Annotated.  
American Law Reports, First through Sixth Series.  
American Law Reports, Federal.

### **Tables:**

In Volume 41, a Table Eleven-A comparing provisions of the 1976 Constitution of Georgia to the 1983 Constitution of Georgia and a Table Eleven-B comparing provisions of the 1983 Constitution of Georgia to the 1976 Constitution of Georgia.

An updated version of Table Fifteen which reflects legislation through the 2013 Regular Session of the General Assembly.

**Indices:**

A cumulative replacement index to laws codified in the 2013 supplement pamphlets and in the bound volumes of the Code.

**Contacting LexisNexis®:**

Visit our Website at <http://www.lexisnexis.com> for an online bookstore, technical support, customer service, and other company information.

If you have questions or suggestions concerning the Official Code of Georgia Annotated, please write or call toll free 1-800-833-9844, fax at 1-518-487-3584, or email us at [Customer.Support@lexisnexis.com](mailto:Customer.Support@lexisnexis.com). Direct written inquiries to:

LexisNexis®

Attn: Official Code of Georgia Annotated

701 East Water Street

Charlottesville, Virginia 22902-5389



# TITLE 41

## NUISANCES

Chap.

1. General Provisions, 41-1-1 through 41-1-10.
2. Abatement of Nuisances Generally, 41-2-1 through 41-2-17.
3. Places Used for Unlawful Sexual and Drug Activities, 41-3-1 through 41-3-13.

---

### CHAPTER 1

#### GENERAL PROVISIONS

Sec.	Sec.
41-1-7. Treatment of agricultural facilities and operations and forest land as nuisances.	41-1-10. Hunting operations not nuisances under certain conditions.

#### 41-1-1. Nuisance defined generally.

**Law reviews.** — For survey article on real property law for the period from June 1, 2002 to May 31, 2003, see 55 Mercer L. Rev. 397 (2003). For annual survey of zoning and land use law, see 57 Mercer L.

Rev. 447 (2005); and 58 Mercer L. Rev. 477 (2006). For survey article on zoning and land use law, see 59 Mercer L. Rev. 493 (2007) and 60 Mercer L. Rev. 457 (2008).

#### JUDICIAL DECISIONS

##### ANALYSIS

GENERAL CONSIDERATION  
POWER OF MUNICIPALITY TO CREATE NUISANCE  
CLASSES OF NUISANCES  
4. CONTINUING NUISANCE  
MANNER OF PROOF  
ILLUSTRATIVE CASES

##### General Consideration

**County noise ordinance deemed unconstitutional.** — A trial court declared a Effingham County, Georgia noise ordinance to be unconstitutional and the county did not appeal that decision. *Effingham County Bd. of Comm'rs v. Shuler Bros.*, 265 Ga. App. 754, 595 S.E.2d 526 (2004).

**Nuisances are anything that cause hurt, inconvenience, or damage to an-**

**other** and the fact that the act done may otherwise be lawful shall not keep it from being a nuisance. A nuisance is permanent if the damage it causes is complete when the action creating the nuisance first occurs and gives rise to a single cause of action that initiates the running of the statute of limitation. On the other hand, a nuisance is not permanent if it causes continuing damage and is one which can and should be abated by the person erecting or maintaining it. In that case, every

continuance of the nuisance is a fresh nuisance for which a fresh action will lie and a fresh statute of limitations begins to run. *Oglethorpe Power Corp. v. Forrister*, 303 Ga. App. 271, 693 S.E.2d 553 (2010).

#### **Qualification on use of property.**

Restrictive covenant prohibiting “noxious or offensive activity” or anything “which may be or may become an annoyance or nuisance” is too vague, indefinite and uncertain for enforcement in a court of equity by injunction, except insofar as these words may be included within the definition of a nuisance. *Douglas v. Wages*, 271 Ga. 616, 523 S.E.2d 330 (1999).

**Cited in** *Meredith v. Thompson*, 312 Ga. App. 697, 719 S.E.2d 592 (2011).

### **Power of Municipality to Create Nuisance**

**City could not be held liable for an alleged nuisance** created by the homeowners’ decision to plug an underground drainage pipe because there was no evidence that the city owned the pipe or exercised direct dominion and control over the pipe. *Merlino v. City of Atlanta*, 283 Ga. 186, 657 S.E.2d 859 (2008).

### **Classes of Nuisances**

#### **4. Continuing Nuisance**

**Continuance gives rise to new cause of action.**

Where a municipality negligently constructs or undertakes to maintain a sewer or drainage system that causes the repeated flooding of property, a continuing abatable nuisance is established, for which the municipality is liable. *Martin v. City of Ft. Valley*, 235 Ga. App. 20, 508 S.E.2d 244 (1998).

As the home buyers presented evidence that a developer’s actions in clearing trees from the adjacent property increased the surface water flow and erosion on their land and made their drainage problem worse, these facts would support a finding of a continuing nuisance. *Walker v. Johnson*, 278 Ga. App. 806, 630 S.E.2d 70 (2006), overruled on other grounds, *Kleber v. City of Atlanta*, 291 Ga. App. 146, 661 S.E.2d 195 (2008).

**Duty of wrongdoer to terminate**

**continuing nuisance.**

Trial court did not err by denying a church’s motion for judgment notwithstanding the verdict in a property owner’s action for trespass and nuisance on the ground that there was an absence of evidence of negligence or proximate cause linking the church to the owner’s injuries because the evidence showed that excess rainwater flowed from the church property onto the owner’s property in a continuing manner; even though the church did not cause the initial leak, own the water that leaked, or have any responsibility for the compaction of the soil around the underground utility lines, the jury could find that the initial leak caused a condition on its property that in turn caused continued excessive flooding of the owner’s property thereafter. *Bailey v. Annistown Rd. Baptist Church, Inc.*, 301 Ga. App. 677, 689 S.E.2d 62 (2009), cert. denied, No. S10C0669, 2010 Ga. LEXIS 468 (Ga. 2010).

### **Manner of Proof**

#### **Insufficient allegations.**

Because an Olympic Committee acted in a lawful manner in operation of an Olympic Park, and no evidence was presented to the contrary, a nuisance claim against it lacked merit. *Anderson v. Atlanta Comm. for the Olympic Games, Inc.*, 261 Ga. App. 895, 584 S.E.2d 16 (2003), aff’d, sub nom. *Atlanta Comm. for the Olympic Games, Inc. v. Hawthorne*, 278 Ga. 116, 598 S.E.2d 471 (2004).

### **Illustrative Cases**

**Flooding after plugging of underground drainage pipe.** — In a suit involving two landowning couples, it was error to grant summary judgment to the second couple on the first couple’s nuisance claim after the second couple plugged an underground drainage pipe. Although the act of plugging the pipe might not have been wrongful in itself, the potential consequence of the uphill flooding of the first couple’s property after the pipe was plugged created an issue of fact as to whether the couple could be held liable for creating a continuing nuisance.

*Merlino v. City of Atlanta*, 283 Ga. 186, 657 S.E.2d 859 (2008).

**Nuisance claim barred by statute of repose.** — Purchaser's nuisance claims against a county, the county health department, and builders were barred by the statute of repose, O.C.G.A. § 9-3-51, because the purchaser could not maintain a nuisance action under the facts asserted in the purchaser's complaint; a plaintiff cannot maintain a nuisance claim that is based upon damage to a house resulting from a defect constructed into the house that was concealed from the plaintiff by the builder and/or the seller because, instead, the applicable causes of action are fraud against the seller and/or negligent construction against the builder. *Wilhelm v. Houston County*, 310 Ga. App. 506, 713 S.E.2d 660 (2011), cert. denied, 2012 Ga. LEXIS 219 (Ga. 2012).

**Permanent obstruction of city streets.**

In view of evidence that a property owner's private road impeded the necessary passage of a city's emergency personnel so as to significantly endanger the health and safety of those persons residing at apartment complexes adjacent to the road, the owner was improperly granted summary judgment in the city's suit seeking abatement of a public nuisance under O.C.G.A. § 41-1-2. *City of College Park v. 2600 Camp Creek, LLC*, 293 Ga. App. 207, 666 S.E.2d 607 (2008).

**Cellular tower was not a nuisance** as the tower was lawfully constructed. *Sanders v. Henry County*, No. 11-13717, 2012 U.S. App. LEXIS 14560 (11th Cir. July 17, 2012) (Unpublished).

**Smoke.**

Trial court erred by granting the neighbors' motion for summary judgment in a property owners' action to recover damages arising from smoke emanating from the neighbors' outdoor fireplace because the evidence was sufficient to create a jury question on the issue of whether the smoke from the neighbors' outdoor fireplace would reasonably interfere with an ordinary person's enjoyment of life; the neighbors had a fire in their outdoor fireplace approximately thirty times in a three-year period, and each time, the owners could smell the smoke in their home

and suffered from itchy eyes, headaches, scratchy throats, and breathing problems. *Weller v. Blake*, 315 Ga. App. 214, 726 S.E.2d 698 (2012).

**Taxi cabs.** — In a wrongful death and nuisance suit wherein the victim was killed while traveling in a taxi cab on a state highway, and the taxi cab had passed a mandatory city inspection the day prior, the trial court properly granted summary judgment to the city on the nuisance claim; as a matter of law, the city had no notice of a dangerous condition within the meaning of a nuisance via its inspection as, even though there was evidence in the record that inspector did not measure tire tread depth, there was no evidence that taxicabs with insufficient tread on their tires routinely passed city inspections and thereafter were involved in collisions that caused injury. *Heller v. City of Atlanta*, 290 Ga. App. 345, 659 S.E.2d 617 (2008), aff'd, Ga. DOT v. Heller, 285 Ga. 262, 674 S.E.2d 914 (2009).

Decedent was killed when the taxi in which the decedent was riding spun out of control on a rain-slick road and hit a tree. An isolated incident involving a city inspector's giving the taxi a passing grade despite the taxi's extremely worn tires was insufficient to give rise to a nuisance claim against the city. *Ga. DOT v. Heller*, 285 Ga. 262, 674 S.E.2d 914 (2009).

**Mills.** — Appeals court affirmed summary judgment for a chip mill; the mill was operated lawfully in a county location that the mill and county specifically negotiated and rezoned for its operation, and the lawful operation was not conditioned on hours of operation, so the mill's operation was not a nuisance. If the act is lawful in itself, it becomes a nuisance only when conducted in an illegal manner to the hurt, inconvenience, or damage of another. *Effingham County Bd. of Comm'rs v. Shuler Bros.*, 265 Ga. App. 754, 595 S.E.2d 526 (2004).

**Detention pond.** — Judgment entered for plaintiffs on their nuisance claim was proper; although the developer's maintaining a detention pond was itself legal, it became a nuisance when conducted in an illegal manner to the damage of plaintiffs' land. The fact that defendant did not



own the pond that created the nuisance did not shield defendant from liability, as the jury could have found from defendant's ownership interest in the entity that maintained the detention pond that it had sufficient control over the decision not to modify the pond so as to hold it liable for the damages caused by the pond. *Sumitomo Corp. v. Deal*, 256 Ga. App. 703, 569 S.E.2d 608 (2002).

**Excess water runoff.** — In two cases involving a dispute for nuisance and trespass arising out of excessive water runoff which flowed onto a landowner's land, the trial court's grant of summary judgment to a construction contractor was reversed, while the denial of summary judgment to a developer was affirmed, as: (1) the testimony as to the presence of the excess runoff and its cause, presented questions of fact for a jury; (2) merely because the county approved the development activities did not mean that either the contractor or the developer or both could not be held liable for a nuisance; and (3) the landowner's action against the alleged creators of the water-runoff was authorized, regardless of the landowner having sold the property. *Green v. Eastland Homes, Inc.*, 284 Ga. App. 643, 644 S.E.2d 479 (2007), cert. denied, 2007 Ga. LEXIS 629 (Ga. 2007).

#### **Diversion of surface water.**

Landowners' of a lakefront property created a nuisance when they went onto a corporation's dam and plugged the weakened dam to prevent a lake from draining. *Bishop Eddie Long Ministries, Inc. v. Dillard*, 272 Ga. App. 894, 613 S.E.2d 673 (2005).

Although the government required the owners of a weakened dam to take certain safety precautions to maintain the level of water in a lake at a low level, the owners' refusal to repair the dam was not a justifi-

cation for creating a nuisance. *Bishop Eddie Long Ministries, Inc. v. Dillard*, 272 Ga. App. 894, 613 S.E.2d 673 (2005).

Jury properly awarded damages against a corporation and in favor of the lakefront landowners because the corporation created a nuisance by attempting to breach the dam and drain the lake, rather than repairing and maintaining a dam so it could impound water. *Bishop Eddie Long Ministries, Inc. v. Dillard*, 272 Ga. App. 894, 613 S.E.2d 673 (2005).

**Railroad and city alleged to have failed to maintain a culvert and drainage pipe that caused flood damage.** — Appellate court erred by reversing summary judgment to a railroad and a city in the homeowners' nuisance and negligence suit as the homeowners' permanent nuisance claim was barred by the four year statute of limitations period set forth in O.C.G.A. § 9-3-30; and the homeowners failed to show triable issues of fact on their continuing nuisance claim that the railroad improperly maintained the culvert and drainage pipe at issue or that the city had any duty to maintain the culvert and pipe since the homeowners failed to show that the city had taken any control over the property in question. *City of Atlanta v. Kleber*, 285 Ga. 413, 677 S.E.2d 134 (2009).

#### **Electromagnetic radiation.**

Church was not liable for nuisance to an injured party who was criminally attacked adjacent to its property by a third-party as a one-time occurrence did not amount to a nuisance and was an isolated occurrence or act, despite the injured party's accusations that her assailant might have concealed himself in the bushes near the abandoned church building before attacking her. *Barnes v. St. Stephen's Missionary Baptist Church*, 260 Ga. App. 765, 580 S.E.2d 587 (2003).

## **RESEARCH REFERENCES**

**ALR.** — Tower or antenna as constituting nuisance, 88 ALR5th 641.

Keeping of domestic animal as constituting public or private nuisance, 90 ALR5th 619.

Sewage treatment plant as constituting nuisance, 92 ALR5th 517.

Nudity as constituting nuisance, 92 ALR5th 593.

Hog breeding, confining, or processing

facility as constituting nuisance, 93 ALR5th 621.

Remedies for sewage treatment plant alleged or deemed to be nuisance, 101 ALR5th 287.

Municipal liability for damage resulting from obstruction or clogging of drain or sewer, 54 ALR6th 201.

## 41-1-2. Classes of nuisances; public and private nuisances defined.

**Law reviews.** — For annual survey of local government law, see 57 Mercer L.

Rev. 289 (2005); and 58 Mercer L. Rev. 267 (2006).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

##### PUBLIC NUISANCE

#### General Consideration

**Cited** in *Thompson v. City of Fitzgerald*, 248 Ga. App. 725, 548 S.E.2d 368 (2001).

#### Public Nuisance

##### All members of public not injured.

— Trial court correctly entered summary judgment against the mothers on their public nuisance count because the evidence did not show that all members of the public who came into contact with the river were injured and, thus, the mother's public nuisance cause of action was effectively erased. During the decades prior to the deaths, no other person had ever drowned when entering the river via the boat ramp, whether during power generation or otherwise, and the other six boys who accompanied the decedents into the water on the ramp that day were uninjured. *White v. Ga. Power Co.*, 265 Ga. App. 664, 595 S.E.2d 353 (2004).

Because there was no evidence that a sewer line backup injured more than a few individuals who came into contact with it, it did not constitute a public nuisance, pursuant to O.C.G.A. § 41-1-2, and the four-year limitations period of O.C.G.A. § 9-3-30 applied to the nuisance claim

brought by the property owners against a city. *Davis v. City of Forsyth*, 275 Ga. App. 747, 621 S.E.2d 495 (2005).

**Disposal of chemicals.** — The plaintiff's disposal of its chemicals at a specified site did not amount to creation of a public nuisance since (1) any contamination of the property caused by the plaintiff did not affect a common right of all members of the public, such as the right to clean air or clean water, and (2) it was not shown that the rights of more than a few individuals were affected by the contamination. *Briggs & Stratton Corp. v. Concrete Sales & Servs.*, 29 F. Supp. 2d 1372 (M.D. Ga. 1998).

##### Defective condition of private street.

— In view of evidence that a property owner's private road impeded the necessary passage of a city's emergency personnel so as to significantly endanger the health and safety of those persons residing at apartment complexes adjacent to the road, the owner was improperly granted summary judgment in the city's suit seeking abatement of a public nuisance under O.C.G.A. § 41-1-2. *City of College Park v. 2600 Camp Creek, LLC*, 293 Ga. App. 207, 666 S.E.2d 607 (2008).

## RESEARCH REFERENCES

**ALR.** — Tower or antenna as constituting nuisance, 88 ALR5th 641.

Keeping of domestic animal as constituting public or private nuisance, 90 ALR5th 619.

Sewage treatment plant as constituting nuisance, 92 ALR5th 517.

Nudity as constituting nuisance, 92 ALR5th 593.

Remedies for sewage treatment plant alleged or deemed to be nuisance, 101 ALR5th 287.

## 41-1-3. Right of action for public nuisance generally.

## JUDICIAL DECISIONS

**Pleadings in civil action.** — Even though it appeared that a homeowner's operation of an elevator in violation of departmental rules and regulations gave rise to a public nuisance under § 8-2-107(a), because plaintiffs did not inform defendant that they were relying

on a nuisance theory until they moved for a directed verdict at the close of the evidence, the court did not err in denying their motion for directed verdict on a ground not timely asserted. *Childers v. Monson*, 241 Ga. App. 70, 524 S.E.2d 326 (1999).

## RESEARCH REFERENCES

**ALR.** — Remedies for sewage treatment plant alleged or deemed to be nuisance, 101 ALR5th 287.

## 41-1-4. Right of action for private nuisance generally.

## JUDICIAL DECISIONS

**Non-owner lacked standing.** — A party could not prevail on its claim for continuing private nuisance since it sold the property at issue and did not own the property during any part of the four years preceding the filing of the action. *Briggs & Stratton Corp. v. Concrete Sales & Servs.*, 29 F. Supp. 2d 1372 (M.D. Ga. 1998).

**Recovery for both personal and property damage, etc.**

In accord with *City of Atlanta v. Murphy*. See *Arvida/JMB Partners v. Hadaway*, 227 Ga. App. 335, 489 S.E.2d 125 (1997).

Where the owners' evidence of repeated flooding established an abatable nuisance, an award of both personal and property damages as well as attorney's fees was adequate; the trial court's jury charge was proper and the court did not abuse its discretion in denying a directed verdict or a judgment notwithstanding the verdict.

*City of Gainesville v. Waters*, 258 Ga. App. 555, 574 S.E.2d 638 (2002).

Where the owners' evidence of repeated flooding established an abatable nuisance, an award of both personal and property damages as well as attorney's fees were adequate; the trial court's jury charge was proper and the court did not abuse its discretion in denying a directed verdict or a judgment notwithstanding the verdict. *City of Gainesville v. Waters*, 258 Ga. App. 555, 574 S.E.2d 638 (2002).

In a nuisance suit brought by a property owner against the City of Atlanta, involving the city failing to properly maintain a storm pipe that traversed and served the property owner's land which resulted in extensive flooding of the land and the home, the trial court properly awarded compensatory damages in the amount of \$300,000 and that amount was not excessive, as a matter of law, as there was



evidence that the property owner suffered special damages in the amount of \$203,376, including loss of personal property, diminution in the value of the property, and rental expenses incurred when the property owner was forced to move from the home. There was also sufficient evidence to support an award of damages for personal injuries and damages for annoyance and discomfort. *City of Atlanta v. Hofrichter*, 291 Ga. App. 883, 663 S.E.2d 379 (2008).

**Damages not excessive.** — Because the jury heard evidence of defendant's interference with plaintiff's right to enjoy possession of his property and his discomfort and annoyance and the unobjected to jury form specifically authorized general damages, trial court did not abuse its discretion in rejecting the claim of excessiveness. *Woodmen of the World v. Jordan*, 231 Ga. App. 517, 499 S.E.2d 900 (1998).

Landowners of a lakefront property created a nuisance when they went onto a corporation's dam and plugged the weakened dam to prevent a lake from draining.

*Bishop Eddie Long Ministries, Inc. v. Dillard*, 272 Ga. App. 894, 613 S.E.2d 673 (2005).

**Inverse condemnation for nuisance.** — Summary judgment was properly granted to a county on an inverse condemnation claim filed by four property owners as the county did not either create or maintain a construction project that allegedly created a nuisance that harmed the owners since a city owned and maintained the nuisance property, the county exercised no control over the properties, and the county could not be deemed to have performed a continuous act that caused the owners' harm; while the county bid out the construction contract, it had no role in designing the plans for the contractor to use on the project or in supervising the contractor's work and the owners did not show that the county official performed any action beyond passing on an inquiry between the Georgia Department of Transportation and the city. *Reidling v. City of Gainesville*, 280 Ga. App. 698, 634 S.E.2d 862 (2006).

## 41-1-5. Right of action of alienee of injured property for continuance of nuisance; necessity for request to abate nuisance.

**Law reviews.** — For annual survey on real property, see 64 *Mercer L. Rev.* 255 (2012).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

#### NOTICE OF EXISTENCE OF NUISANCE

### General Consideration

**Duty required.** — There must be a duty to abate a nuisance before liability for the maintenance of a continuing nuisance may attach. *Bradford Square Condo. Ass'n v. Miller*, 258 Ga. App. 240, 573 S.E.2d 405 (2002).

**Lessee of property was liable for damages from continuing contamination** he originally caused, and the fact that he had vacated the premises would

not remove his legal duty to abate the nuisance he caused and which continued within four years of plaintiffs' action. *Smith v. Branch*, 226 Ga. App. 626, 487 S.E.2d 35 (1997).

**Cited** in *Crowe v. Coleman*, 113 F.3d 1536 (11th Cir. 1997); *West v. CSX Transp., Inc.*, 230 Ga. App. 872, 498 S.E.2d 67 (1998); *Bailey v. Annistown Rd. Baptist Church, Inc.*, 301 Ga. App. 677, 689 S.E.2d 62 (2009).

**Notice of Existence of Nuisance**

**Notice of existence or request for abatement must be given alienee.**

Trial court correctly determined that a property owner's failure to provide ante litem notice to an apartment owner prohibited the property owner from pursuing nuisance claims because, pursuant to O.C.G.A. § 41-1-5(b), the property owner was required to provide the apartment owner with notice of the nuisance or a request to abate prior to filing suit unless it did anything to increase the nuisance; the apartment owner acquired the property after detention ponds had been built and after storm water runoff from the property had already become problematic on the property owner's land, and the property owner presented no evidence that the apartment altered the property or took any other affirmative action to

increase the nuisance. *Haarhoff v. Jefferson at Perimeter L.P.*, 315 Ga. App. 271, 727 S.E.2d 140 (2012).

**Damages accruing before notice.** —

Any damages accruing prior to notice are not recoverable. *Macko v. City of Lawrenceville*, 231 Ga. App. 671, 499 S.E.2d 707 (1998), overruled on other grounds, *Kleber v. City of Atlanta*, 291 Ga. App. 146, 661 S.E.2d 195 (2008).

**Notice not sufficient.** — Letters to homeowners were legally insufficient to give the required notice to abate nuisance caused by the allegedly undersized drainage pipes; letter stated city blamed homeowners for not maintaining pipes and that if further litigation was necessary they could be named as parties. *Macko v. City of Lawrenceville*, 231 Ga. App. 671, 499 S.E.2d 707 (1998), overruled on other grounds, *Kleber v. City of Atlanta*, 291 Ga. App. 146, 661 S.E.2d 195 (2008).

**41-1-7. Treatment of agricultural facilities and operations and forest land as nuisances.**

(a) It is the declared policy of the state to conserve, protect, and encourage the development and improvement of its agricultural and forest land and facilities for the production or distribution of food and other agricultural products, including without limitation forest products. When nonagricultural land uses extend into agricultural or agriculture-supporting industrial or commercial areas or forest land or when there are changed conditions in or around the locality of an agricultural facility or agricultural support facility, such operations often become the subject of nuisance actions. As a result, such facilities are sometimes forced to cease operations. Many others are discouraged from making investments in agricultural support facilities or farm improvements or adopting new related technology or methods. It is the purpose of this Code section to reduce losses of the state's agricultural and forest land resources by limiting the circumstances under which agricultural facilities and operations or agricultural support facilities may be deemed to be a nuisance.

(b) As used in this Code section, the term:

(1) "Agricultural area" means any land which is, or may be, legally used for an agricultural operation under applicable zoning laws, rules, and regulations at the time of commencement of the agricultural operation of the agricultural facility at issue and throughout the first year of operation of such agricultural facility. Any land which is not subject to zoning laws, rules, and regulations at the time of

commencement of an agricultural operation of an agricultural facility and throughout the first year of operation of such agricultural facility shall be deemed an "agricultural area" for purposes of this Code section.

(2) "Agricultural facility" includes, but is not limited to, any land, building, structure, pond, impoundment, appurtenance, machinery, or equipment which is used for the commercial production or processing of crops, livestock, animals, poultry, honeybees, honeybee products, livestock products, poultry products, timber, forest products, or products which are used in commercial aquaculture. Such term shall also include any farm labor camp or facilities for migrant farm workers.

(3) "Agricultural operation" means:

(A) The plowing, tilling, or preparation of soil at an agricultural facility;

(B) The planting, growing, fertilizing, harvesting, or otherwise maintaining of crops as defined in Code Section 1-3-3 and also timber and trees that are grown for purposes other than for harvest and for sale;

(C) The application of pesticides, herbicides, or other chemicals, compounds, or substances to crops, weeds, or soil in connection with the production of crops, timber, livestock, animals, or poultry;

(D) The breeding, hatching, raising, producing, feeding, keeping, slaughtering, or processing of livestock, hogs, equines, chickens, turkeys, poultry or other fowl normally raised for food, mules, cattle, sheep, goats, dogs, rabbits, or similar farm animals for commercial purposes;

(E) The production and keeping of honeybees, the production of honeybee products, and honeybee processing facilities;

(F) The production, processing, or packaging of eggs or egg products;

(G) The manufacturing of feed for poultry or livestock;

(H) The rotation of crops, including without limitation timber production;

(I) Commercial aquaculture;

(J) The application of existing, changed, or new technology, practices, processes, or procedures to any agricultural operation; and

(K) The operation of any roadside market.



(3.1) "Agricultural support facility" means any food processing plant or forest products processing plant together with all related or ancillary activities, including trucking; provided, however, that this term expressly excludes any rendering plant facility or operation.

(4) "Changed conditions" means any one or more of the following:

(A) Any change in the use of land in an agricultural area or in an industrial or commercial area affecting an agricultural support facility;

(B) An increase in the magnitude of an existing use of land in or around the locality of an agricultural facility or agricultural support facility and includes, but is not limited to, urban sprawl into an agricultural area or into an industrial or commercial area in or around the locality of such facility, or an increase in the number of persons making any such use, or an increase in the frequency of such use; or

(C) The construction or location of improvements on land in or around the locality of an agricultural facility or agricultural support facility closer to such facility than those improvements located on such land at the time of commencement of the agricultural or agricultural support operation or the agricultural facility or agricultural support facility at issue and throughout the first year of operation of said facility.

(4.1) "Food processing plant" means a commercial operation that manufactures, packages, labels, distributes, or stores food for human consumption and does not provide food directly to a consumer.

(4.2) "Forest products processing plant" means a commercial operation that manufactures, packages, labels, distributes, or stores any forest product or that manufactures, packages, labels, distributes, or stores any building material made from gypsum rock.

(4.3) "Rendering plant" has the meaning provided by Code Section 4-4-40.

(5) "Urban sprawl" means either of the following or both:

(A) With regard to an agricultural area or agricultural operation:

(i) The conversion of agricultural areas from traditional agricultural use to residential use; or

(ii) An increase in the number of residences in an agricultural area which increase is unrelated to the use of the agricultural area for traditional agricultural purposes.

(B) With regard to an agricultural support facility:

(i) The conversion of industrial or commercial areas to residential use; or

(ii) An increase in the number of residences in an industrial or commercial area which increase is unrelated to the use of the industrial or commercial area for traditional industrial or commercial purposes.

(c) No agricultural facility, agricultural operation, any agricultural operation at an agricultural facility, agricultural support facility, or any operation at an agricultural support facility shall be or shall become a nuisance, either public or private, as a result of changed conditions in or around the locality of such facility or operation if the facility or operation has been in operation for one year or more. The provisions of this subsection shall not apply when a nuisance results from the negligent, improper, or illegal operation of any such facility or operation.

(d) For purposes of this Code section, the established date of operation is the date on which an agricultural operation or agricultural support facility commenced operation. If the physical facilities of the agricultural operation or the agricultural support facility are subsequently expanded or new technology adopted, the established date of operation for each change is not a separately and independently established date of operation and the commencement of the expanded operation does not divest the agricultural operation or agricultural support facility of a previously established date of operation. (Ga. L. 1980, p. 1253, §§ 1, 2; Ga. L. 1988, p. 1775, § 1; Ga. L. 1989, p. 317, § 1; Ga. L. 2002, p. 817, § 1; Ga. L. 2004, p. 681, § 1; Ga. L. 2007, p. 267, § 1/SB 101.)

**The 2002 amendment**, effective May 13, 2002, inserted “or when there are changed conditions in or around the locality of an agricultural facility” in subsection (a), and in subsection (b), added paragraph (1), redesignated former paragraphs (1) and (2) as present paragraphs (2) and (3), respectively, and added paragraphs (4) and (5).

**The 2004 amendment**, effective July 1, 2004, rewrote this Code section.

**The 2007 amendment**, effective July

1, 2007, added “or that manufactures, packages, labels, distributes, or stores any building material made from gypsum rock” at the end of paragraph (b)(4.2).

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2003, a comma was deleted preceding “or both” in paragraph (b)(5).

Pursuant to Code Section 28-9-5, in 2004, “however, that this” was substituted for “however, this” paragraph (b)(3.1).

## RESEARCH REFERENCES

**ALR.** — Hog breeding, confining, or processing facility as constituting nuisance, 93 ALR5th 621.

**41-1-9. Sport shooting ranges.****JUDICIAL DECISIONS**

**No injunction as a nuisance.** — A sporting clay course cannot be enjoined as a sound generating nuisance if it does not run afoul of local noise control ordinances or ordinances aimed at the regulation of a sport shooting range. *Jenkins v. Clayton*, 273 Ga. 439, 542 S.E.2d 503 (2001).

**RESEARCH REFERENCES**

**Am. Jur. Proof of Facts.** — Citizen Suit Under the Noise Control Act, 58 POF3d 315.

**41-1-10. Hunting operations not nuisances under certain conditions.**

(a) As used in this Code section, the term “hunting operation” means an operation including any of the following:

(1) Lands, including the buildings and improvements thereon, which are used or which are intended for use as a hunting club, hunting preserve, or shooting preserve;

(2) Lands, including the buildings and improvements thereon, which are used or which are intended for use as a kennel, training facility, or field trial facility for the breeding, showing, raising or training of hunting and sporting dogs; or

(3) Clubs, associations, partnerships, sole proprietorships, corporations and other business and social entities whose activities or holdings include the lands and uses described in paragraphs (1) and (2) of this subsection.

(b) No hunting operation shall be or shall become a nuisance, either public or private, solely as a result of changed conditions in or around the locality of such hunting operation if the hunting operation has been in operation for at least one year since the date on which it commenced activity as a hunting operation. Subsequent physical expansion of the hunting operation shall not establish a new date of commencement of activity for purposes of this Code section.

(c) No hunting operation shall be subject to any action for civil or criminal liability, damages, abatement, or injunctive relief resulting from or relating to lawful hunting activities generated by the hunting operation if the hunting operation remains in compliance with Title 27 and the rules and regulations adopted by the Board of Natural Resources pursuant to Title 27.

(d) This Code section shall not apply to hunting operations which are conducted in violation of any provision of Title 27 or the rules and



regulations adopted by the Board of Natural Resources pursuant to Title 27. (Code 1981, § 42-1-10, enacted by Ga. L. 2010, p. 952, § 11/SB 474.)

**Effective date.** — This Code section became effective June 3, 2010.

**Editor’s notes.** — This Code section formerly pertained to signs for privately owned businesses. The former Code sec-

tion was based on Code 1981, § 41-1-10, enacted by Ga. L. 2001, p. 1196, § 5.1 and was repealed by Ga. L. 2002, p. 415, § 41, effective April 18, 2002.

## CHAPTER 2

### ABATEMENT OF NUISANCES GENERALLY

Sec.		Sec.	
41-2-2.	Filing of complaint to abate public nuisance.	41-2-9.	County or municipal ordinances relating to unfit buildings or structures.
41-2-7.	Power of counties and municipalities to repair, close, or demolish unfit buildings or structures; health hazards on private property; properties affected.	41-2-12.	Service of complaints or orders upon parties in interest and owners of unfit buildings or structures.
41-2-8.	Definitions for use in Code Sections 41-2-7 through 41-2-17.	41-2-17.	Prior ordinances relating to repair, closing, or demolition of unfit buildings or structures.

#### 41-2-2. Filing of complaint to abate public nuisance.

Private citizens may not generally interfere to have a public nuisance abated. A complaint must be filed by the district attorney, solicitor-general, city attorney, or county attorney on behalf of the public. However, a public nuisance may be abated upon filing of a complaint by any private citizen specially injured. (Orig. Code 1863, § 3999; Code 1868, § 4027; Code 1873, § 4098; Code 1882, § 4098; Civil Code 1895, §§ 4761, 4766; Civil Code 1910, §§ 5330, 5338; Code 1933, § 72-202; Ga. L. 1980, p. 620, § 2; Ga. L. 1999, p. 467, § 1.)

**The 1999 amendment,** effective July 1, 1999, substituted “complaint” for “petition” in the second and third sentences, and inserted “, solicitor-general, city attorney, or county attorney” in the second sentence.

**Law reviews.** — For note on 1999 amendment of this Code section, see 16 Ga. St. U.L. Rev. 211 (1999).

### JUDICIAL DECISIONS

#### ANALYSIS

#### GENERAL CONSIDERATION

### General Consideration

**Cited** in Upper Chattahoochee Riverkeeper Fund, Inc. v. City of Atlanta, 986 F. Supp. 1406 (N.D. Ga. 1997).

## 41-2-4. Issuance of injunction where nuisance about to be erected or commenced likely to result in irreparable damage.

### JUDICIAL DECISIONS

#### ANALYSIS

#### GENERAL CONSIDERATION BASIS OF INJUNCTION

#### General Consideration

**Cited** in Payne v. Terrell, 269 Ga. App. 540, 604 S.E.2d 551 (2004); Hitch v. Vasarhelyi, 285 Ga. 627, 680 S.E.2d 411 (2009).

#### Basis of Injunction

#### Mere apprehension of injury and damage.

The trial court properly declined to permanently enjoin the defendants from us-

ing their property as a public motocross track. The defendants closed the track to the public before the plaintiffs filed suit, and the plaintiffs did not establish to a reasonably certain degree under O.C.G.A. § 41-2-4 that the defendants would re-open it to the public; thus, the trial court was not required to issue an injunction merely because the plaintiffs apprehended a public use at some future time. Evans v. Knott, 282 Ga. 584, 652 S.E.2d 535 (2007).

## 41-2-7. Power of counties and municipalities to repair, close, or demolish unfit buildings or structures; health hazards on private property; properties affected.

(a) It is found and declared that in the counties and municipalities of this state there is the existence or occupancy of dwellings or other buildings or structures which are unfit for human habitation or for commercial, industrial, or business occupancy or use and not in compliance with the applicable state minimum standard codes as adopted by ordinance or operation of law or any optional building, fire, life safety, or other codes relative to the safe use of real property and real property improvements adopted by ordinance in the jurisdiction where the property is located; or general nuisance law and which constitute a hazard to the health, safety, and welfare of the people of this state; and that a public necessity exists for the repair, closing, or demolition of such dwellings, buildings, or structures. It is found and declared that in the counties and municipalities of this state where there is in existence a condition or use of real estate which renders adjacent real estate unsafe or inimical to safe human habitation, such use is dangerous and injurious to the health, safety, and welfare of the people of this state and a public necessity exists for the repair of such condition or the cessation of such use which renders the adjacent real

estate unsafe or inimical to safe human habitation. Whenever the governing authority of any county or municipality of this state finds that there exist in such county or municipality dwellings, buildings, or structures which are unfit for human habitation or for commercial, industrial, or business uses due to dilapidation and not in compliance with applicable codes; which have defects increasing the hazards of fire, accidents, or other calamities; which lack adequate ventilation, light, or sanitary facilities; or where other conditions exist rendering such dwellings, buildings, or structures unsafe or unsanitary, or dangerous or detrimental to the health, safety, or welfare, or otherwise inimical to the welfare of the residents of such county or municipality, or vacant, dilapidated dwellings, buildings, or structures in which drug crimes are being committed, power is conferred upon such county or municipality to exercise its police power to repair, close, or demolish the aforesaid dwellings, buildings, or structures in the manner provided in this Code section and Code Sections 41-2-8 through 41-2-17.

(b) All the provisions of this Code section and Code Sections 41-2-8 through 41-2-17 including method and procedure may also be applied to private property where there exists an endangerment to the public health or safety as a result of unsanitary or unsafe conditions to those persons residing or working in the vicinity. A finding by any governmental health department, health officer, or building inspector that such property is a health or safety hazard shall constitute prima-facie evidence that said property is in violation of this Code section and Code Sections 41-2-8 through 41-2-17.

(c) The exercise of the powers conferred upon counties in this Code section and in Code Sections 41-2-8 through 41-2-17 shall be limited to properties located in the unincorporated areas of such counties. (Ga. L. 1966, p. 3089, § 2; Ga. L. 1977, p. 4445, § 2; Code 1981, § 41-2-7, enacted by Ga. L. 1982, p. 2107, § 45; Ga. L. 1983, p. 3, § 30; Ga. L. 1986, p. 10, § 41; Ga. L. 1986, p. 1508, § 1; Ga. L. 1988, p. 1419, § 2; Ga. L. 1989, p. 1161, § 1; Ga. L. 2001, p. 1196, § 1.)

**The 2001 amendment**, effective July 1, 2001, rewrote subsections (a) and (b). Government Law,” see 53 Mercer L. Rev. 389 (2001).

**Law reviews.** — For article, “Local

## JUDICIAL DECISIONS

**Cited** in Walker County v. Tri-State Crematory, 284 Ga. App. 34, 643 S.E.2d 324 (2007).



**41-2-8. Definitions for use in Code Sections 41-2-7 through 41-2-17.**

As used in Code Section 41-2-7, this Code section, and Code Sections 41-2-9 through 41-2-17, the term:

(1) “Applicable codes” means (A) any optional housing or abatement standard provided in Chapter 2 of Title 8 as adopted by ordinance or operation of law, or other property maintenance standards as adopted by ordinance or operation of law, or general nuisance law, relative to the safe use of real property; (B) any fire or life safety code as provided for in Chapter 2 of Title 25; and (C) any building codes adopted by local ordinance prior to October 1, 1991, or the minimum standard codes provided in Chapter 2 of Title 8 after October 1, provided that such building or minimum standard codes for real property improvements shall be deemed to mean those building or minimum standard codes in existence at the time such real property improvements were constructed unless otherwise provided by law.

(2) “Closing” means causing a dwelling, building, or structure to be vacated and secured against unauthorized entry.

(3) “Drug crime” means an act which is a violation of Article 2 of Chapter 13 of Title 16, known as the “Georgia Controlled Substances Act.”

(4) “Dwellings, buildings, or structures” means any building or structure or part thereof used and occupied for human habitation or commercial, industrial, or business uses, or intended to be so used, and includes any outhouses, improvements, and appurtenances belonging thereto or usually enjoyed therewith and also includes any building or structure of any design. As used in Code Section 41-2-7, this Code section, and Code Sections 41-2-9 through 41-2-17, the term “dwellings, buildings, or structures” shall not mean or include any farm, any building or structure located on a farm, or any agricultural facility or other building or structure used for the production, growing, raising, harvesting, storage, or processing of crops, livestock, poultry, or other farm products.

(5) “Governing authority” means the board of commissioners or sole commissioner of a county or the council, board of commissioners, board of aldermen, or other legislative body charged with governing a municipality.

(6) “Interested parties” means:

(A) Owner;

(B) Those parties having an interest in the property as revealed by a certification of title to the property conducted in accordance with the title standards of the State Bar of Georgia;

(C) Those parties having filed a notice in accordance with Code Section 48-3-9;

(D) Any other party having an interest in the property whose identity and address are reasonably ascertainable from the records of the petitioner or records maintained in the county courthouse or by the clerk of the court. Interested parties shall not include the holder of the benefit or burden of any easement or right of way whose interest is properly recorded which interest shall remain unaffected; and

(E) Persons in possession of said property and premises.

(7) "Municipality" means any incorporated city within this state.

(8) "Owner" means the holder of the title in fee simple and every mortgagee of record.

(9) "Public authority" means any member of a governing authority, any housing authority officer, or any officer who is in charge of any department or branch of the government of the municipality, county, or state relating to health, fire, or building regulations or to other activities concerning dwellings, buildings, or structures in the county or municipality.

(10) "Public officer" means the officer or officers who are authorized by Code Section 41-2-7, this Code section, and Code Sections 41-2-9 through 41-2-17 and by ordinances adopted under Code Section 41-2-7, this Code section, and Code Sections 41-2-9 through 41-2-17 to exercise the powers prescribed by such ordinances or any agent of such officer or officers.

(11) "Repair" means altering or improving a dwelling, building, or structure so as to bring the structure into compliance with the applicable codes in the jurisdiction where the property is located and the cleaning or removal of debris, trash, and other materials present and accumulated which create a health or safety hazard in or about any dwelling, building, or structure.

(12) "Resident" means any person residing in the jurisdiction where the property is located on or after the date on which the alleged nuisance arose. (Code 1981, § 41-2-8, enacted by Ga. L. 1982, p. 2107, § 45; Ga. L. 1986, p. 1508, § 2; Ga. L. 1988, p. 1419, § 2; Ga. L. 1989, p. 14, § 41; Ga. L. 1989, p. 1161, § 2; Ga. L. 1991, p. 94, § 41; Ga. L. 2001, p. 1196, § 2; Ga. L. 2004, p. 907, § 1.)

**The 2001 amendment**, effective July 1, 2001, added paragraph (1), redesignated former paragraphs (1) through (10) as present paragraphs (2) through (11), respectively; rewrote paragraph (2); inserted “, improvements,” in the first sentence of paragraph (4); substituted “Governing authority” for “Governing body” in paragraph (5); rewrote paragraphs (8), (9), and (11); and added paragraph (12).

**The 2004 amendment**, effective July 1, 2004, added paragraph (6); redesignated former paragraphs (6) and (7) as present paragraphs (7) and (8), respectively; and deleted former paragraph (8), which read: “(8) ‘Parties in interest’ means:

“(A) Persons in possession of said property and premises;

“(B) Persons having of record in the county in which the dwelling, building, or structure is located any vested right, title, or interest in or lien upon such dwelling,

building, or structure or the lot, tract, or parcel of real property upon which the structure is situated or upon which the public health hazard or general nuisance exists based upon a 50 year title examination conducted in accordance with the title standards of the State Bar of Georgia;

“(C) Persons having paid an occupational tax to the governing authority for a location or office at the subject building or structure; or

“(D) Persons having filed a property tax return with the governing authority as to the subject property, building, or structure.”

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2004, “Interested parties” was substituted for “Interested party” twice in paragraph (6).

Pursuant to Code Section 28-9-5, in 2005, the quotation marks surrounding “Interested parties” were deleted in the last sentence of subparagraph (6)(D).

## **41-2-9. County or municipal ordinances relating to unfit buildings or structures.**

(a) In addition to any other remedies or enforcement mechanisms available, upon the adoption of an ordinance finding that dwelling, building, or structure conditions of the character described in Code Section 41-2-7 exist within a county or municipality, the governing body of such county or municipality is authorized to adopt ordinances relating to the dwellings, buildings, or structures within such county or municipality which are unfit for human habitation or commercial, industrial, or business uses and not in compliance with applicable codes, which are vacant and being used in connection with the commission of drug crimes, or which constitute an endangerment to the public health or safety as a result of unsanitary or unsafe conditions. Such ordinances shall include at least the following provisions:

(1) That it is the duty of the owner of every dwelling, building, structure, or property within the jurisdiction to construct and maintain such dwelling, building, structure, or property in conformance with applicable codes in force within the jurisdiction, or such ordinances which regulate and prohibit activities on property and which declare it to be a public nuisance to construct or maintain any dwelling, building, structure, or property in violation of such codes or ordinances;

(2) That a public officer be designated or appointed to exercise the powers prescribed by the ordinances;



(3) That whenever a request is filed with the public officer by a public authority or by at least five residents of the municipality or by five residents of the unincorporated area of the county if the property in question is located in the unincorporated area of the county charging that any dwelling, building, structure, or property is unfit for human habitation or for commercial, industrial, or business use and not in compliance with applicable codes; is vacant and being used in connection with the commission of drug crimes; or constitutes an endangerment to the public health or safety as a result of unsanitary or unsafe conditions, the public officer shall make an investigation or inspection of the specific dwelling, building, structure, or property. If the officer's investigation or inspection identifies that any dwelling, building, structure, or property is unfit for human habitation or for commercial, industrial, or business use and not in compliance with applicable codes; is vacant and being used in connection with the commission of drug crimes; or constitutes an endangerment to the public health or safety as a result of unsanitary or unsafe conditions, the public officer may issue a complaint in rem against the lot, tract, or parcel of real property on which such dwelling, building, or structure is situated or where such public health hazard or general nuisance exists and shall cause summons and a copy of the complaint to be served on the interested parties for such dwelling, building, or structure. The complaint shall identify the subject real property by appropriate street address and official tax map reference; identify the interested parties; state with particularity the factual basis for the action; and contain a statement of the action sought by the public officer to abate the alleged nuisance. The summons shall notify the interested parties that a hearing will be held before a court of competent jurisdiction as determined by Code Section 41-2-5, at a date and time certain and at a place within the county or municipality where the property is located. Such hearing shall be held not less than 15 days nor more than 45 days after the filing of said complaint in the proper court. The interested parties shall have the right to file an answer to the complaint and to appear in person or by attorney and offer testimony at the time and place fixed for hearing;

(4) That if, after such notice and hearing, the court determines that the dwelling, building, or structure in question is unfit for human habitation or is unfit for its current commercial, industrial, or business use and not in compliance with applicable codes; is vacant and being used in connection with the commission of drug crimes; or constitutes an endangerment to the public health or safety as a result of unsanitary or unsafe conditions, the court shall state in writing findings of fact in support of such determination and shall issue and cause to be served upon the interested parties that have answered the complaint or appeared at the hearing an order:

(A) If the repair, alteration, or improvement of the said dwelling, building, or structure can be made at a reasonable cost in relation to the present value of the dwelling, building, or structure, requiring the owner, within the time specified in the order, to repair, alter, or improve such dwelling, building, or structure so as to bring it into full compliance with the applicable codes relevant to the cited violation and, if applicable, to secure the structure so that it cannot be used in connection with the commission of drug crimes; or

(B) If the repair, alteration, or improvement of the said dwelling, building, or structure in order to bring it into full compliance with applicable codes relevant to the cited violations cannot be made at a reasonable cost in relation to the present value of the dwelling, building, or structure, requiring the owner, within the time specified in the order, to demolish and remove such dwelling, building, or structure and all debris from the property.

For purposes of this Code section, the court shall make its determination of “reasonable cost in relation to the present value of the dwelling, building, or structure” without consideration of the value of the land on which the structure is situated; provided, however, that costs of the preparation necessary to repair, alter, or improve a structure may be considered. Income and financial status of the owner shall not be factor in the court’s determination. The present value of the structure and the costs of repair, alteration, or improvement may be established by affidavits of real estate appraisers with a Georgia appraiser classification as provided in Chapter 39A of Title 43, qualified building contractors, or qualified building inspectors without actual testimony presented. Costs of repair, alteration, or improvement of the structure shall be the cost necessary to bring the structure into compliance with the applicable codes relevant to the cited violations in force in the jurisdiction;

(5) That, if the owner fails to comply with an order to repair or demolish the dwelling, building, or structure, the public officer may cause such dwelling, building, or structure to be repaired, altered, or improved or to be vacated and closed or demolished. Such abatement action shall commence within 270 days after the expiration of time specified in the order for abatement by the owner. Any time during which such action is prohibited by a court order issued pursuant to Code Section 41-2-13 or any other equitable relief granted by a court of competent jurisdiction shall not be counted toward the 270 days in which such abatement action must commence. The public officer shall cause to be posted on the main entrance of the building, dwelling, or structure a placard with the following words:

“This building is unfit for human habitation or commercial, industrial, or business use and does not comply with the applicable codes

or has been ordered secured to prevent its use in connection with drug crimes or constitutes an endangerment to public health or safety as a result of unsanitary or unsafe conditions. The use or occupation of this building is prohibited and unlawful.”;

(6) If the public officer has the structure demolished, reasonable effort shall be made to salvage reusable materials for credit against the cost of demolition. The proceeds of any moneys received from the sale of salvaged materials shall be used or applied against the cost of the demolition and removal of the structure, and proper records shall be kept showing application of sales proceeds. Any such sale of salvaged materials may be made without the necessity of public advertisement and bid. The public officer and governing authority are relieved of any and all liability resulting from or occasioned by the sale of any such salvaged materials, including, without limitation, defects in such salvaged materials; and

(7) That the amount of the cost of demolition, including all court costs, appraisal fees, administrative costs incurred by the county tax commissioner or municipal tax collector or city revenue officer, and all other costs necessarily associated with the abatement action, including restoration to grade of the real property after demolition, shall be a lien against the real property upon which such cost was incurred.

(b)(1) The lien provided for in paragraph (7) of subsection (a) of this Code section shall attach to the real property upon the filing of a certified copy of the order requiring repair, closure, or demolition in the office of the clerk of superior court in the county where the real property is located and shall relate back to the date of the filing of the lis pendens notice required under subsection (c) of Code Section 41-2-12. The clerk of superior court shall record and index such certified copy of the order in the deed records of the county and enter the lien on the general execution docket. The lien shall be superior to all other liens on the property, except liens for taxes to which the lien shall be inferior, and shall continue in force until paid.

(2) Upon final determination of costs, fees, and expenses incurred in accordance with this chapter, the public officer responsible for enforcement actions in accordance with this chapter shall transmit to the appropriate county tax commissioner or municipal tax collector or city revenue officer a statement of the total amount due and secured by said lien, together with copies of all notices provided to interested parties. The statement of the public officer shall be transmitted within 90 days of completion of the repairs, demolition, or closure. It shall be the duty of the appropriate county tax commissioner or municipal tax collector or city revenue officer, who is responsible or whose duties include the collection of municipal taxes, to collect the amount of the lien using all methods available for collecting real



property ad valorem taxes, including specifically Chapter 4 of Title 48; provided, however, that the limitation of Code Section 48-4-78 which requires 12 months of delinquency before commencing a tax foreclosure shall not apply. A county tax commissioner shall collect and enforce municipal liens imposed pursuant to this chapter in accordance with Code Section 48-5-359.1. The county tax commissioner or municipal tax collector or city revenue officer shall remit the amount collected to the governing authority of the county or municipality whose lien is being collected.

(3) Enforcement of liens pursuant to this Code section may be initiated at any time following receipt by the county tax commissioner or municipal tax collector or city revenue officer of the final determination of costs in accordance with this chapter. The unpaid lien amount shall bear interest and penalties from and after the date of final determination of costs in the same amount as applicable to interest and penalties on unpaid real property ad valorem taxes. An enforcement proceeding pursuant to Code Section 48-4-78 for delinquent ad valorem taxes may include all amounts due under this chapter.

(4) The redemption amount in any enforcement proceeding pursuant to this Code section shall be the full amount of the costs as finally determined in accordance with this Code section together with interest, penalties, and costs incurred by the governing authority, county tax commissioner, municipal tax collector, or city revenue officer in the enforcement of such lien. Redemption of property from the lien may be made in accordance with the provisions of Code Sections 48-4-80 and 48-4-81.

(c) The governing authority may waive and release any such lien imposed on property upon the owner of such property entering into a contract with the county or municipality agreeing to a timetable for rehabilitation of the real property or the dwelling, building, or structure on the property and demonstrating the financial means to accomplish such rehabilitation.

(d) Where the abatement action does not commence in the superior court, review of a court order requiring the repair, alteration, improvement, or demolition of a dwelling, building, or structure shall be by direct appeal to the superior court under Code Section 5-3-29.

(e) In addition to the procedures and remedies in this chapter, a governing authority may provide by ordinance that designated public officers may issue citations for violations of state minimum standard codes, optional building, fire, life safety, and other codes adopted by ordinance, and conditions creating a public health hazard or general nuisance, and seek to enforce such citations in a court of competent

jurisdiction prior to issuing a complaint in rem as provided in this Code section.

(f) Nothing in this Code section shall be construed to impair or limit in any way the power of the county or municipality to define and declare nuisances and to cause their removal or abatement by summary proceedings or otherwise. (Code 1981, § 41-2-9, enacted by Ga. L. 1982, p. 2107, § 45; Ga. L. 1983, p. 3, § 30; Ga. L. 1984, p. 22, § 41; Ga. L. 1988, p. 1419, § 2; Ga. L. 1989, p. 14, § 41; Ga. L. 1989, p. 1161, § 3; Ga. L. 1990, p. 1347, § 1; Ga. L. 1991, p. 94, § 41; Ga. L. 2001, p. 1196, § 3; Ga. L. 2004, p. 907, § 2; Ga. L. 2005, p. 60, § 41/HB 95.)

**The 2001 amendment**, effective July 1, 2001, rewrote this Code section.

**The 2004 amendment**, effective July 1, 2004, in subsection (a), substituted “interested parties” for “owner and parties in interest” throughout, substituted “interested parties for” for “owner and parties in interest in” in the second sentence of paragraph (a)(3), added the second and third sentences in paragraph (a)(5), and substituted “county tax commissioner or municipal tax collector or city revenue officer”

for “tax commissioner” in paragraph (a)(7); and, in subsection (b), rewrote paragraphs (b)(1) and (b)(2), and added paragraphs (b)(3) and (b)(4).

**The 2005 amendment**, effective April 7, 2005, part of an Act to revise, modernize, and correct the Code, revised punctuation in the undesignated paragraph in paragraph (a)(4).

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2001, “and” was inserted at the end of paragraph (a)(6).

## JUDICIAL DECISIONS

**County’s recovery of compensatory damages not authorized.** — When a county recovered, identified, and properly disposed of bodies found at a crematorium, O.C.G.A. §§ 31-5-10(d) and 41-2-9(a)(7) did not authorize the county to recover its costs of doing so as compensatory damages in a tort action against the crematorium, funeral homes, and funeral directors alleging negligence and public nuisance; O.C.G.A. §§ 31-5-10 and 41-2-9 do not authorize a county to obtain compensatory damages in a tort action as a means of redress for abating a public nuisance. *Walker County v. Tri-State Crematory*, 284 Ga. App. 34, 643 S.E.2d 324 (2007).

**Construction with § 41-2-17.** — It was error to hold, based on O.C.G.A. § 41-2-17, that landowners were not entitled under O.C.G.A. § 41-2-9(d) to directly appeal from a municipal court’s demolition order because the city’s nuisance ordinance predated § 41-2-9(a). Section 41-2-9(d) was a specific statute, thereby prevailing over the general statute, § 41-2-17, and as § 41-2-9(d) was unambiguous, the court would not read any limitation onto the statute’s plain meaning. *Yasmine’s Entm’t Hall v. City of Marietta*, 292 Ga. App. 114, 663 S.E.2d 741 (2008).

## 41-2-12. Service of complaints or orders upon parties in interest and owners of unfit buildings or structures.

(a) Complaints issued by a public officer pursuant to an ordinance adopted under Code Sections 41-2-7 through 41-2-11, this Code section, and Code Sections 41-2-13 through 41-2-17 shall be served in the following manner. At least 14 days prior to the date of the hearing, the

public officer shall mail copies of the complaint by certified mail or statutory overnight delivery, return receipt requested, to all interested parties whose identities and addresses are reasonably ascertainable. Copies of the complaint shall also be mailed by first-class mail to the property address to the attention of the occupants of the property, if any, and shall be posted on the property within three business days of filing the complaint and at least 14 days prior to the date of the hearing.

(b) For interested parties whose mailing address is unknown, a notice stating the date, time, and place of the hearing shall be published in the newspaper in which the sheriff's advertisements appear in such county once a week for two consecutive weeks prior to the hearing.

(c) A notice of *lis pendens* shall be filed in the office of the clerk of superior court in the county in which the dwelling, building, or structure is located at the time of filing the complaint in the appropriate court. Such notice shall have the same force and effect as other *lis pendens* notices provided by law.

(d) Orders and other filings made subsequent to service of the initial complaint shall be served in the manner provided in this Code section on any interested party who answers the complaint or appears at the hearing. Any interested party who fails to answer or appear at the hearing shall be deemed to have waived all further notice in the proceedings. (Code 1981, § 41-2-12, enacted by Ga. L. 1982, p. 2107, § 45; Ga. L. 1983, p. 3, § 30; Ga. L. 1986, p. 1508, § 3; Ga. L. 1988, p. 1419, § 2; Ga. L. 1989, p. 14, § 41; Ga. L. 1991, p. 94, § 41; Ga. L. 1992, p. 1538, § 1; Ga. L. 2000, p. 1589, § 3; Ga. L. 2001, p. 1196, § 4; Ga. L. 2004, p. 907, § 3.)

**The 2000 amendment**, effective July 1, 2000, substituted "certified mail or statutory overnight delivery" for "certified mail" at the end of the second sentence in subsection (c).

**The 2001 amendment**, effective July 1, 2001, rewrote this Code section.

**The 2004 amendment**, effective July 1, 2004, rewrote this Code section.

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2004, "identities

and addresses" was substituted for "identity and address" in subsection (a).

**Editor's notes.** — Ga. L. 2000, p. 1589, § 16, not codified by the General Assembly, provides that subsection (c) is applicable with respect to notices delivered on or after July 1, 2000.

**Law reviews.** — For article, "Local Government Law," see 53 Mercer L. Rev. 389 (2001).

## **41-2-17. Prior ordinances relating to repair, closing, or demolition of unfit buildings or structures.**

Ordinances relating to the subject matter of Code Sections 41-2-7 through 41-2-16 and this Code section adopted prior to July 1, 2001, shall have the same force and effect on and after said date as ordinances adopted subsequent to and by authority of these Code sections. (Code



1981, § 41-2-17, enacted by Ga. L. 1982, p. 2107, § 45; Ga. L. 1991, p. 94, § 41; Ga. L. 2001, p. 1196, § 5.)

**The 2001 amendment**, effective July 1, 2001, substituted “July 1, 2001” for “April 1, 1966” in this Code section.

**Law reviews.** — For article, “Local Government Law,” see 53 Mercer L. Rev. 389 (2001).

## JUDICIAL DECISIONS

**Construction with § 41-2-9.** — It was error to hold, based on O.C.G.A. § 41-2-17, that landowners were not entitled under O.C.G.A. § 41-2-9(d) to directly appeal from a municipal court’s demolition order because the city’s nuisance ordinance predated § 41-2-9(a). Section 41-2-9(d) was a specific statute, thereby

prevailing over the general statute, § 41-2-17, and as § 41-2-9(d) was unambiguous, the court would not read any limitation onto the statute’s plain meaning. *Yasmine’s Entm’t Hall v. City of Marietta*, 292 Ga. App. 114, 663 S.E.2d 741 (2008).

## CHAPTER 3

### PLACES USED FOR UNLAWFUL SEXUAL AND DRUG ACTIVITIES

Sec.	Sec.
41-3-1.1. Substantial drug related activity upon real property; knowledge of owner; remedies cumulative.	41-3-2. Action to enjoin nuisance perpetually; temporary restraining order or interlocutory injunction authorized.

#### **41-3-1. Establishment, maintenance, or use of building, structure, or place for unlawful sexual purposes; evidence of nuisance.**

**Law reviews.** — For note on 1999 amendment of this Code section, see 16 Ga. St. U.L. Rev. 211 (1999).

#### **41-3-1.1. Substantial drug related activity upon real property; knowledge of owner; remedies cumulative.**

(a) As used in this Code section, the term:

(1) “Drug related indictment” means an indictment by a grand jury for an offense involving violation of Code Section 16-13-30; provided, however, that any such indictments which result directly from cooperation between the property owner and a law enforcement agency shall not be considered a drug related indictment for purposes of this Code section.

(2) “Substantial drug related activity” means activity resulting in six or more separate incidents resulting in drug related indictments involving violations occurring within a 12 month period on the same parcel of real property.

(b) Any owner of real property who has actual knowledge that substantial drug related activity is being conducted on such property shall be guilty of maintaining a nuisance, and such real property shall be deemed a nuisance and may be enjoined or otherwise abated as provided in this chapter.

(c) The owner of real property shall be deemed to have actual knowledge of substantial drug related activity occurring on a parcel of real property if the district attorney of the county in which the property is located notifies the owner in writing of three or more separate incidents within a 12 month period which result in drug related indictments and, after the receipt of such notice and within 12 months of the first of the incidents resulting in a drug related indictment which are the subject of such notice, three or more separate incidents occur which result in drug related indictments.

(d) The provisions of this Code section are cumulative of any other remedies and shall not be construed to repeal any other existing remedies for drug related nuisances. (Code 1981, § 41-3-1.1, enacted by Ga. L. 1996, p. 666, § 1; Ga. L. 1999, p. 467, § 2.)

**The 1999 amendment**, effective July 1, 1999, added subsection (d).

#### **41-3-2. Action to enjoin nuisance perpetually; temporary restraining order or interlocutory injunction authorized.**

Whenever a nuisance is kept, maintained, or exists, as defined in Code Section 41-3-1 or 41-3-1.1, the district attorney, the solicitor-general, city attorney, or county attorney, or any private citizen of the county may maintain an action in the name of the state upon the relation of such attorney or private citizen to enjoin said nuisance perpetually, the person or persons conducting or maintaining the same, and the owner or agent of the building, structure, or place, and the ground itself in or upon which such nuisance exists. In an action to enjoin a nuisance, the court, upon application therefor alleging that the nuisance complained of exists, shall order a temporary restraining order or an interlocutory injunction as provided in Code Section 9-11-65. (Ga. L. 1917, p. 177, § 2; Code 1933, § 72-302; Ga. L. 1996, p. 666, § 2; Ga. L. 1999, p. 467, § 3.)

**The 1999 amendment**, effective July 1, 1999, in the first sentence, inserted “, the solicitor-general, city attorney, or county attorney,” and substituted “such attorney” for “such district attorney”.

**Law reviews.** — For note on 1999 amendment to this Code section, see 16 Ga. St. U.L. Rev. 211 (1999).



# TITLE 42

## PENAL INSTITUTIONS

Chap.

1. General Provisions, 42-1-1 through 42-1-19.
2. Board and Department of Corrections, 42-2-1 through 42-2-16.
3. Georgia Building Authority (Penal), 42-3-1 through 42-3-32. [Repealed]
4. Jails, 42-4-1 through 42-4-105.
5. Correctional Institutions of State and Counties, 42-5-1 through 42-5-125.
6. Detainers, 42-6-1 through 42-6-25.
8. Probation, 42-8-1 through 42-8-159.
9. Pardons and Paroles, 42-9-1 through 42-9-90.
10. Correctional Industries, 42-10-1 through 42-10-5.
12. Prison Litigation Reform, 42-12-1 through 42-12-9.
13. International Transfer of Prisoners, 42-13-1 through 42-13-2.

---

**Cross references.** — Securing of attendance of prisoners at trials, § 24-13-60 et seq.

---

## CHAPTER 1

### GENERAL PROVISIONS

Article 1		Sec.	
Inmate Policies		42-1-7.	Notification to transporting law enforcement agency of inmate's or patient's infectious or communicable disease.
Sec.	Definitions.		
42-1-1.	Use of inmate for private gain.	42-1-11.1.	Alien prisoners eligible for deportation; cooperation with federal deportation program; waiver of extradition rights; transportation.
42-1-5.	Injury or contact by inmate presenting possible threat of transmission of communicable disease.		
42-1-6.			

Sec.		Sec.	
42-1-11.2.	Advice on employment of attorney prohibited; penalty.		
<b>Article 2</b>			
<b>Sexual Offender Registration Review Board</b>			
42-1-12.	State Sexual Offender Registry.	42-1-16.	Definitions; employment restrictions for sexual offenders; penalties.
42-1-13.	Sexual Offender Registration Review Board; composition; appointment; administration and duties; immunity from liability.	42-1-17.	Definitions; residency restrictions for sexual offenders; penalties.
42-1-14.	Risk assessment classification; classification as “sexually dangerous predator”; electronic monitoring.	42-1-18.	“Photograph” defined; photographing minor without consent of parent or guardian prohibited; penalty.
42-1-15.	Restriction on registered offenders residing, working, or	42-1-19.	Petition for release from registration requirements.

## ARTICLE 1

### INMATE POLICIES

**Editor’s notes.** — Ga. L. 2006, p. 379, § 24/HB 1059, designated Code Sections 42-1-1 through 42-1-11 as Article 1 of this chapter.

**Law reviews.** — For article on 2006 amendment of this article, see 23 Ga. St. U.L. Rev. 11 (2006).

#### 42-1-1. Definitions.

Except as specifically provided otherwise, as used in this title, the term:

- (1) “Board” means the Board of Corrections.
- (2) “Case plan” means an individualized accountability and behavior change strategy for a probationer, as applicable.
- (3) “Commissioner” means the commissioner of corrections.
- (4) “Criminal risk factors” means characteristics and behaviors that affect a person’s risk for committing future crimes and include, but are not limited to, antisocial behavior, antisocial personality, criminal thinking, criminal associates, having a dysfunctional family, having low levels of employment or education, poor use of leisure and recreation time, and substance abuse.
- (5) “Department” means the Department of Corrections.
- (6) “Graduated sanctions” means:
  - (A) Verbal and written warnings;

- (B) Increased restrictions and reporting requirements;
- (C) Community service or work crews;
- (D) Referral to substance abuse or mental health treatment or counseling programs in the community;
- (E) Increased substance abuse screening and monitoring;
- (F) Electronic monitoring, as such term is defined in Code Section 42-8-151; and
- (G) An intensive supervision program.

(7) “Risk and needs assessment” means an actuarial tool, approved by the board and validated on a targeted population, scientifically proven to determine a person’s risk to recidivate and to identify criminal risk factors that, when properly addressed, can reduce that person’s likelihood of committing future criminal behavior. (Ga. L. 1921, p. 243, §§ 3, 5; Code 1933, §§ 27-504, 27-9903; Ga. L. 2012, p. 899, § 7-1/HB 1176; Ga. L. 2013, p. 222, § 17/HB 349.)

**The 2012 amendment**, effective July 1, 2012, substituted the present provisions of this Code section for the former provisions, which read: “(a) No employee of a penal institution may give advice to an inmate regarding the name or the employment of an attorney at law in any case where the inmate is confined in a penal institution or receive any sum of money paid as fees or otherwise to attorneys at law in a criminal case or cases against any inmate with which they may be connected in any capacity.

“(b) Any person who violates this Code section shall be guilty of a misdemeanor.” See editor’s note for applicability.

**The 2013 amendment**, effective July 1, 2013, deleted former paragraph (1), which read: “‘Active supervision’ means the period of a probated sentence in which a probationer actively reports to his or her probation supervisor or is otherwise under the direct supervision of a probation supervisor.”; deleted former paragraph (2), which read: “‘Administrative supervision’ means the period of probation supervision that has reduced supervision and reporting requirements commensurate with and that follows active supervision

but that is prior to the termination of a sentence.”; and redesignated former paragraphs (3) through (9) as present paragraphs (1) through (7), respectively. See editor’s note for applicability.

**Editor’s notes.** — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: “This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act.”

Ga. L. 2013, p. 222, § 21/HB 349, not codified by the General Assembly, provides: “This Act shall become effective on July 1, 2013, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2013, shall be governed by the statute in effect at the time of such offense.”

**Law reviews.** — For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012).



## 42-1-2. Reward for information leading to capture of escaped inmate of penal institution under jurisdiction of Board of Corrections.

### RESEARCH REFERENCES

**Am. Jur. Pleading and Practice Forms.** — 21B Am. Jur. Pleading and Practice Forms, Rewards, § 2.

**ALR.** — Validity, construction, and application of state statutory requirement

that person convicted of sexual offense in other jurisdiction register or be classified as sexual offender in forum state, 34 ALR6th 171.

## 42-1-5. Use of inmate for private gain.

(a) As used in this Code section, the term:

(1) “Custodian” means a warden, sheriff, jailer, deputy sheriff, police officer, or any other law enforcement officer having actual custody of an inmate.

(2) “Inmate” means any person who is lawfully incarcerated in a penal institution.

(3) “Penal institution” means any place of confinement for persons accused of or convicted of violating a law of this state or an ordinance of a political subdivision of this state.

(b) It shall be unlawful for a custodian of an inmate of a penal institution to use such inmate or allow such inmate to be used for any purpose resulting in private gain to any individual.

(c) Any person who violates subsection (b) of this Code section shall be guilty of a misdemeanor.

(d) This Code section shall not apply to:

(1) Work on private property because of natural disasters;

(1.1) Work on private property as a form of victim compensation in accordance with Chapter 15A of Title 17;

(2) Work or other programs or releases which have the prior approval of the board or commissioner of corrections;

(3) Community service work programs;

(4) Work-release programs; or

(5) Work programs authorized by Article 6 of Chapter 5 of this title. (Code 1981, § 42-1-4, enacted by Ga. L. 1985, p. 1483, § 1; Ga. L. 1991, p. 94, § 42; Ga. L. 2003, p. 252, § 2; Ga. L. 2005, p. 1222, § 3/HB 58.)

**The 2003 amendment**, effective July 1, 2003, added paragraph (d)(1.1).

**The 2005 amendment**, effective July 1, 2005, in paragraph (d)(3), deleted “or” at the end, in paragraph (d)(4), substituted “; or” for a period at the end, and added paragraph (d)(5).

**Editor’s notes.** — Ga. L. 2005, p. 1222, § 1, not codified by the General Assembly, provides that: “This Act shall be known and may be cited as the ‘Working Against Recidivism Act.’”

Ga. L. 2005, p. 1222, § 2, not codified by the General Assembly, provides that: “The General Assembly finds and declares that:

“(1) Many persons sentenced to confinement for criminal offenses commit additional criminal offenses after release from confinement, and such recidivism is a serious danger to public safety and a major source of expense to the state;

“(2) Under the appropriate conditions and limitations, work programs of voluntary labor by inmates of state and county correctional institutions for privately owned profit-making employers to produce goods, services, or goods and services for sale to public or private purchasers provide substantial public benefits by:

“(A) Providing job experience and skills to participating inmates;

“(B) Allowing participating inmates to accumulate savings available for their use when released from the correctional institution;

“(C) Lowering recidivism rates;

“(D) Generating taxes from inmate income;

“(E) Reducing the cost of incarceration by enabling participating inmates to pay room and board; and

“(F) Providing participating inmates income to pay fines, restitution, and family support;

“(3) Appropriate conditions and limitations for voluntary labor by inmates for such work programs include but are not limited to:

“(A) Assurance that inmates’ work is voluntary;

“(B) Payment of inmates at wages at a rate not less than that paid for work of a similar nature in the locality in which the work is to be performed;

“(C) Provision of federal and state governmental benefits to participating inmates comparable to governmental benefits provided for similarly situated private sector workers;

“(D) Selection of participating inmates with careful attention to security issues;

“(E) Appropriate supervision of inmates during travel or employment outside the correctional institution;

“(F) Assurance that inmate labor will not result in the displacement of employed workers; be applied in skills, crafts, or trades in which there is a surplus of available gainful labor in the locality; or impair existing contracts for services;

“(G) Consultations with local private employers that may be economically impacted; and

“(H) Consultations with local labor union organizations and other local employee groups, especially those who have an interest in the trade or skill to be performed by the inmates; and

“(4) Requirements for the federal Prison Industry Enhancement Certification Program authorized by 18 U.S.C. Section 1761 and federal regulations are sufficient to ensure appropriate conditions and limitations in many areas of concern for programs of voluntary labor by inmates for privately owned profit-making employers to produce goods, services, or goods and services for sale to public and private purchasers.”

## JUDICIAL DECISIONS

**Penal institution.** — Evidence was sufficient for a reasonable fact-finder to find beyond a reasonable doubt that the defendant committed the offense of riot in a penal institution because the state introduced evidence of the defendant’s legal confinement, and the state’s evidence re-

garding the prisoners housed at the county jail would have been sufficient for the jury to conclude that the jail constituted a penal institution within the meaning of O.C.G.A. § 16-10-56, and as defined in the jury charge, had the trial court not ruled on that issue as a matter of law.

Paul v. State, 308 Ga. App. 275, 707 S.E.2d 171 (2011).

#### **42-1-6. Injury or contact by inmate presenting possible threat of transmission of communicable disease.**

If any inmate of any state or county correctional institution, county or municipal jail, or other similar facility, while such inmate is in custody or in the process of being taken into custody, injures or has injured or contacts or has contacted a law enforcement officer, correctional officer, firefighter, emergency medical technician, or other person in such a manner as to present a possible threat of transmission of a communicable disease to the person so injured or contacted, then the warden, jailer, or other official having charge of such inmate may take all reasonable steps to determine whether the inmate has a communicable disease capable of being transmitted by the injury or contact involved. Such steps may include, but shall not be limited to, any appropriate medical examination of or collection of medical specimens from the inmate. In the event an inmate refuses to cooperate in any such procedures, the warden, jailer, or other official may apply to the superior court of the county for an order authorizing the use of any degree of force reasonably necessary to complete such procedures. Upon a showing of probable cause that the injury presents the threat of transmission of a communicable disease, the court shall issue an order authorizing the petitioner to use reasonable measures to perform any medical procedures reasonably necessary to ascertain whether a communicable disease has been transmitted. In addition to any other grounds sufficient to show probable cause for the issuance of such an order, such probable cause may be conclusively established by evidence of the injury or contact in question and a statement by a licensed physician that the nature of the injury or contact is such as to present a threat of transmission of a communicable disease if the inmate has such a disease. The cost of any procedures carried out under this Code section shall be borne by the jurisdiction having custody of the inmate. (Code 1981, § 42-1-6, enacted by Ga. L. 1987, p. 1446, § 1; Ga. L. 2002, p. 660, § 4; Ga. L. 2002, p. 1259, § 11.)

**The 2002 amendments.** — The first 2002 amendment, effective July 1, 2002, substituted “firefighter” for “fireman” near the middle of the first sentence. The second 2002 amendment, effective July 1, 2002, made identical changes.

#### **42-1-7. Notification to transporting law enforcement agency of inmate’s or patient’s infectious or communicable disease.**

(a) For the purposes of this Code section, the term “infectious or communicable disease” shall include infectious hepatitis, tuberculosis,



influenza, measles, chicken pox, meningitis, HIV as defined in Code Section 31-22-9.1, or any venereal disease enumerated in Code Section 31-17-1.

(b) Notwithstanding any other provision of law, any state or county correctional institution, municipal or county detention facility, or any facility as defined in Code Section 37-3-1 shall notify any state or local law enforcement agency required to transport an inmate or patient if such inmate or patient has been diagnosed as having an infectious or communicable disease. Notification shall be limited to the fact that such inmate or patient has an infectious or communicable disease and whether such disease is airborne or transmissible by blood or other body fluids; provided, however, that the specific disease shall not be disclosed. The Department of Public Health shall provide a guide for appropriate precautions to be taken by any person or persons transporting such inmate or patient and shall develop a form to be used for the purpose of ensuring that such precautions are taken.

(c) Information released or obtained pursuant to this Code section shall be privileged and confidential and shall only be released or obtained by the institutions, facilities, or agencies who are parties to the transportation of the patient or inmate. Any person making an unauthorized disclosure of such information shall be guilty of a misdemeanor. (Code 1981, § 42-1-7, enacted by Ga. L. 1991, p. 1319, § 1; Ga. L. 2009, p. 453, § 1-4/HB 228; Ga. L. 2011, p. 705, § 6-3/HB 214.)

**The 2009 amendment**, effective July 1, 2009, substituted “Department of Community Health” for “Department of Human Resources” in the last sentence of subsection (b).

**The 2011 amendment**, effective July 1, 2011, substituted “Department of Pub-

lic Health” for “Department of Community Health” in the last sentence of subsection (b).

**Law reviews.** — For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 147 (2011).

## **42-1-9. Work-release, educational, and habilitative programs for county prisoners.**

### **JUDICIAL DECISIONS**

**Cited in** Legere v. State, 299 Ga. App. 640, 683 S.E.2d 155 (2009).

## **42-1-11.1. Alien prisoners eligible for deportation; cooperation with federal deportation program; waiver of extradition rights; transportation.**

(a) As used in this Code section, the term:

(1) “Alien prisoner” means a person who is not a citizen or national of the United States who is serving a sentence under the supervision of the department.

(2) “Board” means the State Board of Pardons and Paroles.

(3) “Department” means the Department of Corrections.

(4) “Release on a reprieve” means being released on a reprieve with a detainer to United States Immigration and Customs Enforcement.

(b) The department and board shall establish a process and agreements among multiple state, local, and federal agencies for the implementation of the United States Immigration and Customs Enforcement Rapid Removal of Eligible Parolees Accepted for Transfer (REPAT) Program or similar federal program, by whatever name, for the purpose of deporting alien prisoners in the state prison system who are eligible for deportation.

(c) The department shall include as a part of the intake process a procedure to identify alien prisoners eligible for deportation. The department shall coordinate with the federal authorities to determine an alien prisoner’s immigration status and eligibility for removal. The identity and information regarding alien prisoners eligible for deportation shall be provided expeditiously to the board, and the board shall then consider such alien prisoner for a release on a reprieve. Alien prisoners who would otherwise be ineligible for parole shall not become eligible by reason of eligibility for a release on a reprieve.

(d) Upon an alien prisoner’s acceptance into the federal deportation program, the board may establish a tentative release month for the alien prisoner to be transferred into federal custody.

(e) No tentative parole release month based on a release on a reprieve shall be set until the alien prisoner is otherwise eligible for parole. No tentative parole release month shall be set for any date prior to the effective date of a final deportation removal order.

(f) The board shall provide notice and obtain acknowledgment in writing that notice was given to each alien prisoner who is eligible for a release on a reprieve that illegal reentry into the United States shall subject such alien prisoner to being returned to the custody of the department to complete the remainder of his or her court-imposed sentence. Prior to granting a release on a reprieve, the alien prisoner shall make a knowing, voluntary, and intelligent waiver in writing of all rights of extradition which would challenge the alien prisoner’s parole revocation and return the alien prisoner to the department to complete the remainder of his or her sentence in the event such alien prisoner violates a condition of the release on a reprieve.

(g) An alien prisoner shall not be eligible for a release on a reprieve if the federal authorities determine that the alien prisoner's removal is not reasonably foreseeable.

(h) The department shall maintain exclusive control and responsibility for the custody and transportation of alien prisoners to and from federal facilities. (Code 1981, § 42-1-11.1, enacted by Ga. L. 2010, p. 263, § 2/SB 136.)

**Effective date.** — This Code section became effective July 1, 2010.

**Editor's notes.** — Ga. L. 2010, p. 263, § 1, not codified by the General Assembly, provides: "It is the intent of the General Assembly to ensure that alien prisoners subject to deportation are not released from prison into the Georgia community. It is further the intent of this legislative body to reduce the costs and expenses of operating state prisons by reducing the number of alien prisoners incarcerated in the Georgia penal system and to expedite the deportation process of such prisoners. Moreover, Georgia should support the re-

arrest and revocation of parole of any alien prisoner who reenters the United States in violation of a release on a reprieve with a detainer to United States Immigration and Customs Enforcement. The General Assembly intends to require state agencies to take part in the Immigration and Customs Enforcement Rapid Removal of Eligible Parolees Accepted for Transfer (REPAT) Program funded and operated by the United States government and take all measures to fully cooperate and communicate with state, local, and federal agencies for the implementation of such program."

#### 42-1-11.2. Advice on employment of attorney prohibited; penalty.

(a) No employee of a penal institution shall give advice to an inmate regarding the name or the employment of an attorney at law in any case where the inmate is confined in a penal institution or receive any sum of money paid as fees or otherwise to attorneys at law in a criminal case or cases against any inmate with which they may be connected in any capacity.

(b) Any person who violates this Code section shall be guilty of a misdemeanor. (Code 1981, § 42-1-11.2, enacted by Ga. L. 2012, p. 899, § 7-2/HB 1176.)

**Effective date.** — This Code section became effective July 1, 2012. See editor's note for applicability.

**Editor's notes.** — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the

statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

**Law reviews.** — For article on the 2012 enactment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012).



## ARTICLE 2

## SEXUAL OFFENDER REGISTRATION REVIEW BOARD

**Effective date.** — This article became effective July 1, 2006.

**Editor's notes.** — Ga. L. 2006, p. 379, § 24, designated existing Code Sections 42-1-12 and 42-1-13 and new Code Sections 42-1-14 and 42-1-15 as Article 2 of this chapter.

Ga. L. 2006, p. 379, § 1, provides: "The General Assembly finds and declares that recidivist sexual offenders, sexual offenders who use physical violence, and sexual offenders who prey on children are sexual predators who present an extreme threat to the public safety. Many sexual offenders are extremely likely to use physical violence and to repeat their offenses; and some sexual offenders commit many offenses, have many more victims than are ever reported, and are prosecuted for only a fraction of their crimes. The General Assembly finds that this makes the cost of sexual offender victimization to society at large, while incalculable, clearly exorbitant. The General Assembly further finds that the high level of threat that a sexual predator presents to the public safety, and the long-term effects suffered by victims of sex offenses, provide the state with sufficient justification to implement a strategy that includes:

"(1) Incarcerating sexual offenders and maintaining adequate facilities to ensure that decisions to release sexual predators into the community are not made on the basis of inadequate space;

"(2) Requiring the registration of sexual offenders, with a requirement that complete and accurate information be maintained and accessible for use by law enforcement authorities, communities, and the public;

"(3) Providing for community and public notification concerning the presence of sexual offenders;

"(4) Collecting data relative to sexual offenses and sexual offenders;

"(5) Requiring sexual predators who are released into the community to wear an electronic monitoring system for the rest of their natural life and to pay for such system; and

"(6) Prohibiting sexual predators from working with children, either for compensation or as a volunteer.

"The General Assembly further finds that the state has a compelling interest in protecting the public from sexual offenders and in protecting children from predatory sexual activity, and there is sufficient justification for requiring sexual offenders to register and for requiring community and public notification of the presence of sexual offenders. The General Assembly declares that in order to protect the public, it is necessary that the sexual offenders be registered and that members of the community and the public be notified of a sexual offender's presence. The designation of a person as a sexual offender is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from the conviction of certain crimes. Likewise, the designation of a person as a sexual predator is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from findings by the Sexual Offender Registration Review Board and a court if requested by a sexual offender."

**Law reviews.** — For annual survey on criminal law, see 61 Mercer L. Rev. 79 (2009).

## 42-1-12. State Sexual Offender Registry.

(a) As used in this article, the term:

(1) "Address" means the street or route address of the sexual offender's residence. For purposes of this Code section, the term shall not mean a post office box.

(2) "Appropriate official" means:

(A) With respect to a sexual offender who is sentenced to probation without any sentence of incarceration in the state prison system or who is sentenced pursuant to Article 3 of Chapter 8 of this title, relating to first offenders, the Division of Probation of the Department of Corrections;

(B) With respect to a sexual offender who is sentenced to a period of incarceration in a prison under the jurisdiction of the Department of Corrections and who is subsequently released from prison or placed on probation, the commissioner of corrections or his or her designee;

(C) With respect to a sexual offender who is placed on parole, the chairperson of the State Board of Pardons and Paroles or his or her designee; and

(D) With respect to a sexual offender who is placed on probation through a private probation agency, the director of the private probation agency or his or her designee.

(3) “Area where minors congregate” shall include all public and private parks and recreation facilities, playgrounds, skating rinks, neighborhood centers, gymnasiums, school bus stops, public libraries, and public and community swimming pools.

(4) “Assessment criteria” means the tests that the board members use to determine the likelihood that a sexual offender will commit another criminal offense against a victim who is a minor or commit a dangerous sexual offense.

(5) “Board” means the Sexual Offender Registration Review Board.

(6) “Child care facility” means all public and private pre-kindergarten facilities, child care learning centers, preschool facilities, and long-term care facilities for children.

(6.1) “Child care learning center” shall have the same meaning as set forth in paragraph (2) of Code Section 20-1A-2.

(7) “Church” means a place of public religious worship.

(8) “Conviction” includes a final judgment of conviction entered upon a verdict or finding of guilty of a crime, a plea of guilty, or a plea of nolo contendere. A defendant who is discharged without adjudication of guilt and who is not considered to have a criminal conviction pursuant to Article 3 of Chapter 8 of this title, relating to first offenders, shall be subject to the registration requirements of this Code section for the period of time prior to the defendant's discharge after completion of his or her sentence or upon the defendant being adjudicated guilty. Unless otherwise required by federal law, a defendant who is discharged without adjudication of guilt and who is

not considered to have a criminal conviction pursuant to Article 3 of Chapter 8 of this title, relating to first offenders, shall not be subject to the registration requirements of this Code section upon the defendant's discharge.

(9)(A) "Criminal offense against a victim who is a minor" with respect to convictions occurring on or before June 30, 2001, means any criminal offense under Title 16 or any offense under federal law or the laws of another state or territory of the United States which consists of:

- (i) Kidnapping of a minor, except by a parent;
- (ii) False imprisonment of a minor, except by a parent;
- (iii) Criminal sexual conduct toward a minor;
- (iv) Solicitation of a minor to engage in sexual conduct;
- (v) Use of a minor in a sexual performance;
- (vi) Solicitation of a minor to practice prostitution; or
- (vii) Any conviction resulting from an underlying sexual offense against a victim who is a minor.

(B) "Criminal offense against a victim who is a minor" with respect to convictions occurring after June 30, 2001, means any criminal offense under Title 16 or any offense under federal law or the laws of another state or territory of the United States which consists of:

- (i) Kidnapping of a minor, except by a parent;
- (ii) False imprisonment of a minor, except by a parent;
- (iii) Criminal sexual conduct toward a minor;
- (iv) Solicitation of a minor to engage in sexual conduct;
- (v) Use of a minor in a sexual performance;
- (vi) Solicitation of a minor to practice prostitution;
- (vii) Use of a minor to engage in any sexually explicit conduct to produce any visual medium depicting such conduct;
- (viii) Creating, publishing, selling, distributing, or possessing any material depicting a minor or a portion of a minor's body engaged in sexually explicit conduct;
- (ix) Transmitting, making, selling, buying, or disseminating by means of a computer any descriptive or identifying information regarding a child for the purpose of offering or soliciting



sexual conduct of or with a child or the visual depicting of such conduct;

(x) Conspiracy to transport, ship, receive, or distribute visual depictions of minors engaged in sexually explicit conduct; or

(xi) Any conduct which, by its nature, is a sexual offense against a victim who is a minor.

(C) For purposes of this paragraph, a conviction for a misdemeanor shall not be considered a criminal offense against a victim who is a minor, and conduct which is adjudicated in juvenile court shall not be considered a criminal offense against a victim who is a minor.

(10)(A) "Dangerous sexual offense" with respect to convictions occurring on or before June 30, 2006, means any criminal offense, or the attempt to commit any criminal offense, under Title 16 as specified in this paragraph or any offense under federal law or the laws of another state or territory of the United States which consists of the same or similar elements of the following offenses:

(i) Aggravated assault with the intent to rape in violation of Code Section 16-5-21;

(ii) Rape in violation of Code Section 16-6-1;

(iii) Aggravated sodomy in violation of Code Section 16-6-2;

(iv) Aggravated child molestation in violation of Code Section 16-6-4; or

(v) Aggravated sexual battery in violation of Code Section 16-6-22.2.

(B) "Dangerous sexual offense" with respect to convictions occurring after June 30, 2006, means any criminal offense, or the attempt to commit any criminal offense, under Title 16 as specified in this paragraph or any offense under federal law or the laws of another state or territory of the United States which consists of the same or similar elements of the following offenses:

(i) Aggravated assault with the intent to rape in violation of Code Section 16-5-21;

(ii) Kidnapping in violation of Code Section 16-5-40 which involves a victim who is less than 14 years of age, except by a parent;

(iii) False imprisonment in violation of Code Section 16-5-41 which involves a victim who is less than 14 years of age, except by a parent;

- (iv) Rape in violation of Code Section 16-6-1;
- (v) Sodomy in violation of Code Section 16-6-2;
- (vi) Aggravated sodomy in violation of Code Section 16-6-2;
- (vii) Statutory rape in violation of Code Section 16-6-3, if the individual convicted of the offense is 21 years of age or older;
- (viii) Child molestation in violation of Code Section 16-6-4;
- (ix) Aggravated child molestation in violation of Code Section 16-6-4, unless the person was convicted of a misdemeanor offense;
- (x) Enticing a child for indecent purposes in violation of Code Section 16-6-5;
- (xi) Sexual assault against persons in custody in violation of Code Section 16-6-5.1;
- (xii) Incest in violation of Code Section 16-6-22;
- (xiii) A second conviction for sexual battery in violation of Code Section 16-6-22.1;
- (xiv) Aggravated sexual battery in violation of Code Section 16-6-22.2;
- (xv) Sexual exploitation of children in violation of Code Section 16-12-100;
- (xvi) Electronically furnishing obscene material to minors in violation of Code Section 16-12-100.1;
- (xvii) Computer pornography and child exploitation prevention in violation of Code Section 16-12-100.2;
- (xviii) Obscene telephone contact in violation of Code Section 16-12-100.3; or
- (xix) Any conduct which, by its nature, is a sexual offense against a victim who is a minor or an attempt to commit a sexual offense against a victim who is a minor.

(C) For purposes of this paragraph, a conviction for a misdemeanor shall not be considered a dangerous sexual offense, and conduct which is adjudicated in juvenile court shall not be considered a dangerous sexual offense.

(11) "Institution of higher education" means a private or public community college, state university, state college, or independent postsecondary institution.

(12) “Level I risk assessment classification” means the sexual offender is a low sex offense risk and low recidivism risk for future sexual offenses.

(13) “Level II risk assessment classification” means the sexual offender is an intermediate sex offense risk and intermediate recidivism risk for future sexual offenses and includes all sexual offenders who do not meet the criteria for classification either as a sexually dangerous predator or for Level I risk assessment.

(14) “Minor” means any individual under the age of 18 years and any individual that the sexual offender believed at the time of the offense was under the age of 18 years if such individual was the victim of an offense.

(15) “Public and community swimming pools” includes municipal, school, hotel, motel, or any pool to which access is granted in exchange for payment of a daily fee. The term includes apartment complex pools, country club pools, or subdivision pools which are open only to residents of the subdivision and their guests. This term does not include a private pool or hot tub serving a single-family dwelling and used only by the residents of the dwelling and their guests.

(16) “Required registration information” means:

(A) Name; social security number; age; race; sex; date of birth; height; weight; hair color; eye color; fingerprints; and photograph;

(B) Address, within this state or out of state, and, if applicable in addition to the address, a rural route address and a post office box;

(C) If the place of residence is a motor vehicle or trailer, the vehicle identification number, the license tag number, and a description, including color scheme, of the motor vehicle or trailer;

(D) If the place of residence is a mobile home, the mobile home location permit number; the name and address of the owner of the home; a description, including the color scheme of the mobile home; and, if applicable, a description of where the mobile home is located on the property;

(E) If the place of residence is a manufactured home, the name and address of the owner of the home; a description, including the color scheme of the manufactured home; and, if applicable, a description of where the manufactured home is located on the property;

(F) If the place of residence is a vessel, live-aboard vessel, or houseboat, the hull identification number; the manufacturer's serial number; the name of the vessel, live-aboard vessel, or



houseboat; the registration number; and a description, including color scheme, of the vessel, live-aboard vessel, or houseboat;

(F.1) If the place of residence is the status of homelessness, information as provided under paragraph (2.1) of subsection (f) of this Code section;

(G) Date of employment, place of any employment, and address of employer;

(H) Place of vocation and address of the place of vocation;

(I) Vehicle make, model, color, and license tag number;

(J) If enrolled, employed, or carrying on a vocation at an institution of higher education in this state, the name, address, and county of each institution, including each campus attended, and enrollment or employment status; and

(K) The name of the crime or crimes for which the sexual offender is registering and the date released from prison or placed on probation, parole, or supervised release.

(17) "Risk assessment classification" means the notification level into which a sexual offender is placed based on the board's assessment.

(18) "School" means all public and private kindergarten, elementary, and secondary schools.

(19) "School bus stop" means a school bus stop as designated by local school boards of education or by a private school.

(20) "Sexual offender" means any individual:

(A) Who has been convicted of a criminal offense against a victim who is a minor or any dangerous sexual offense;

(B) Who has been convicted under the laws of another state or territory, under the laws of the United States, under the Uniform Code of Military Justice, or in a tribal court of a criminal offense against a victim who is a minor or a dangerous sexual offense; or

(C) Who is required to register pursuant to subsection (e) of this Code section.

(21) "Sexually dangerous predator" means a sexual offender:

(A) Who was designated as a sexually violent predator between July 1, 1996, and June 30, 2006; or

(B) Who is determined by the Sexual Offender Registration Review Board to be at risk of perpetrating any future dangerous sexual offense.

(22) "Vocation" means any full-time, part-time, or volunteer employment with or without compensation exceeding 14 consecutive days or for an aggregate period of time exceeding 30 days during any calendar year.

(b) Before a sexual offender who is required to register under this Code section is released from prison or placed on parole, supervised release, or probation, the appropriate official shall:

(1) Inform the sexual offender of the obligation to register, the amount of the registration fee, and how to maintain registration;

(2) Obtain the information necessary for the required registration information;

(3) Inform the sexual offender that, if the sexual offender changes any of the required registration information, other than residence address, the sexual offender shall give the new information to the sheriff of the county with whom the sexual offender is registered within 72 hours of the change of information; if the information is the sexual offender's new residence address, the sexual offender shall give the information to the sheriff of the county with whom the sexual offender last registered within 72 hours prior to moving and to the sheriff of the county to which the sexual offender is moving within 72 hours prior to moving;

(4) Inform the sexual offender that he or she shall also register in any state where he or she is employed, carries on a vocation, or is a student;

(5) Inform the sexual offender that, if he or she changes residence to another state, the sexual offender shall register the new address with the sheriff of the county with whom the sexual offender last registered and that the sexual offender shall also register with a designated law enforcement agency in the new state within 72 hours after establishing residence in the new state;

(6) Obtain fingerprints and a current photograph of the sexual offender;

(7) Require the sexual offender to read and sign a form stating that the obligations of the sexual offender have been explained;

(8) Obtain and forward any information obtained from the clerk of court pursuant to Code Section 42-5-50 to the sheriff's office of the county in which the sexual offender will reside; and

(9) If required by Code Section 42-1-14, place any required electronic monitoring system on the sexually dangerous predator and explain its operation and cost.

(c) The Department of Corrections shall:

(1) Forward to the Georgia Bureau of Investigation a copy of the form stating that the obligations of the sexual offender have been explained;

(2) Forward any required registration information to the Georgia Bureau of Investigation;

(3) Forward the sexual offender's fingerprints and photograph to the sheriff's office of the county where the sexual offender is going to reside;

(4) Inform the board and the prosecuting attorney for the jurisdiction in which a sexual offender was convicted of the impending release of a sexual offender at least eight months prior to such release so as to facilitate compliance with Code Section 42-1-14; and

(5) Keep all records of sexual offenders in a secure facility in accordance with Code Sections 15-1-10, 15-6-62, and 15-6-62.1 until official proof of death of a registered sexual offender; thereafter, the records shall be destroyed.

(d) No sexual offender shall be released from prison or placed on parole, supervised release, or probation until:

(1) The appropriate official has provided the Georgia Bureau of Investigation and the sheriff's office in the county where the sexual offender will be residing with the sexual offender's required registration information and risk assessment classification level; and

(2) The sexual offender's name has been added to the list of sexual offenders maintained by the Georgia Bureau of Investigation and the sheriff's office as required by this Code section.

(e) Registration pursuant to this Code section shall be required by any individual who:

(1) Is convicted on or after July 1, 1996, of a criminal offense against a victim who is a minor;

(2) Is convicted on or after July 1, 1996, of a dangerous sexual offense;

(3) Has previously been convicted of a criminal offense against a victim who is a minor and may be released from prison or placed on parole, supervised release, or probation on or after July 1, 1996;

(4) Has previously been convicted of a sexually violent offense or dangerous sexual offense and may be released from prison or placed on parole, supervised release, or probation on or after July 1, 1996;

(5) Is a resident of Georgia who intends to reside in this state and who is convicted under the laws of another state or the United States,



under the Uniform Code of Military Justice, or in a tribal court of a sexually violent offense, a criminal offense against a victim who is a minor on or after July 1, 1999, or a dangerous sexual offense on or after July 1, 1996;

(6) Is a nonresident who changes residence from another state or territory of the United States or any other place to Georgia who is required to register as a sexual offender under federal law, military law, tribal law, or the laws of another state or territory or who has been convicted in this state of a criminal offense against a victim who is a minor or any dangerous sexual offense;

(7) Is a nonresident sexual offender who enters this state for the purpose of employment or any other reason for a period exceeding 14 consecutive days or for an aggregate period of time exceeding 30 days during any calendar year regardless of whether such sexual offender is required to register under federal law, military law, tribal law, or the laws of another state or territory; or

(8) Is a nonresident sexual offender who enters this state for the purpose of attending school as a full-time or part-time student regardless of whether such sexual offender is required to register under federal law, military law, tribal law, or the laws of another state or territory.

(f) Any sexual offender required to register under this Code section shall:

(1) Provide the required registration information to the appropriate official before being released from prison or placed on parole, supervised release, or probation;

(2) Register in person with the sheriff of the county in which the sexual offender resides within 72 hours after the sexual offender's release from prison or placement on parole, supervised release, probation, or entry into this state;

(2.1) In the case of a sexual offender whose place of residence is the status of homelessness, in lieu of the requirements of paragraph (2) of this subsection, register in person with the sheriff of the county in which the sexual offender sleeps within 72 hours after the sexual offender's release from prison or placement on parole, supervised release, probation, or entry into this state and provide the location where he or she sleeps;

(3) Maintain the required registration information with the sheriff of each county in which the sexual offender resides or sleeps;

(4) Renew the required registration information with the sheriff of the county in which the sexual offender resides or sleeps by reporting

in person to the sheriff within 72 hours prior to such offender's birthday each year to be photographed and fingerprinted;

(5) Update the required registration information with the sheriff of the county in which the sexual offender resides within 72 hours of any change to the required registration information, other than where he or she resides or sleeps if such person is homeless. If the information is the sexual offender's new address, the sexual offender shall give the information regarding the sexual offender's new address to the sheriff of the county in which the sexual offender last registered within 72 hours prior to any change of address and to the sheriff of the county to which the sexual offender is moving within 72 hours prior to establishing such new address. If the sexual offender is homeless and the information is the sexual offender's new sleeping location, within 72 hours of changing sleeping locations, the sexual offender shall give the information regarding the sexual offender's new sleeping location to the sheriff of the county in which the sexual offender last registered, and if the county has changed, to the sheriff of the county to which the sexual offender has moved; and

(6) Continue to comply with the registration requirements of this Code section for the entire life of the sexual offender, excluding ensuing periods of incarceration.

(g) A sexual offender required to register under this Code section may petition to be released from the registration requirements and from the residency or employment restrictions of this Code section in accordance with the provisions of Code Section 42-1-19.

(h)(1) The appropriate official or sheriff shall, within 72 hours after receipt of the required registration information, forward such information to the Georgia Bureau of Investigation. Once the data is entered into the Criminal Justice Information System by the appropriate official or sheriff, the Georgia Crime Information Center shall notify the sheriff of the sexual offender's county of residence, either permanent or temporary, the sheriff of the county of employment, and the sheriff of the county where the sexual offender attends an institution of higher education within 24 hours of entering the data or any change to the data.

(2) The Georgia Bureau of Investigation shall:

(A) Transmit all information, including the conviction data and fingerprints, to the Federal Bureau of Investigation within 24 hours of entering the data;

(B) Establish operating policies and procedures concerning record ownership, quality, verification, modification, and cancellation; and

(C) Perform mail out and verification duties as follows:

(i) Send each month Criminal Justice Information System network messages to sheriffs listing sexual offenders due for verification;

(ii) Create a photo image file from original entries and provide such entries to sheriffs to assist in sexual offender identification and verification;

(iii) Mail a nonforwardable verification form to the last reported address of the sexual offender within ten days prior to the sexual offender's birthday;

(iv) If the sexual offender changes residence to another state, notify the law enforcement agency with which the sexual offender shall register in the new state; and

(v) Maintain records required under this Code section.

(i) The sheriff's office in each county shall:

(1) Prepare and maintain a list of all sexual offenders and sexually dangerous predators residing in each county. Such list shall include the sexual offender's name; age; physical description; address; crime of conviction, including conviction date and the jurisdiction of the conviction; photograph; and the risk assessment classification level provided by the board, and an explanation of how the board classifies sexual offenders and sexually dangerous predators;

(2) Electronically submit and update all information provided by the sexual offender within two business days to the Georgia Bureau of Investigation in a manner prescribed by the Georgia Bureau of Investigation;

(3) Maintain and provide a list, manually or electronically, of every sexual offender residing in each county so that it may be available for inspection:

(A) In the sheriff's office;

(B) In any county administrative building;

(C) In the main administrative building for any municipal corporation;

(D) In the office of the clerk of the superior court so that such list is available to the public; and

(E) On a website maintained by the sheriff of the county for the posting of general information;

(4) Update the public notices required by paragraph (3) of this subsection within two business days of the receipt of such information;



(5) Inform the public of the presence of sexual offenders in each community;

(6) Update the list of sexual offenders residing in the county upon receipt of new information affecting the residence address of a sexual offender or upon the registration of a sexual offender moving into the county by virtue of release from prison, relocation from another county, conviction in another state, federal court, military tribunal, or tribal court. Such list, and any additions to such list, shall be delivered, within 72 hours of updating the list of sexual offenders residing in the county, to all schools or institutions of higher education located in the county;

(7) Within 72 hours of the receipt of changed required registration information, notify the Georgia Bureau of Investigation through the Criminal Justice Information System of each change of information;

(8) Retain the verification form stating that the sexual offender still resides at the address last reported;

(9) Enforce the criminal provisions of this Code section. The sheriff may request the assistance of the Georgia Bureau of Investigation to enforce the provisions of this Code section;

(10) Cooperate and communicate with other sheriffs' offices in this state and in the United States to maintain current data on the location of sexual offenders;

(11) Determine the appropriate time of day for reporting by sexual offenders, which shall be consistent with the reporting requirements of this Code section;

(12) If required by Code Section 42-1-14, place any electronic monitoring system on the sexually dangerous predator and explain its operation and cost;

(13) Provide current information on names and addresses of all registered sexual offenders to campus police with jurisdiction for the campus of an institution of higher education if the campus is within the sheriff's jurisdiction; and

(14) Collect the annual \$250.00 registration fee from the sexual offender and transmit such fees to the state for deposit into the general fund.

(j)(1) The sheriff of the county where the sexual offender resides or last registered shall be the primary law enforcement official charged with communicating the whereabouts of the sexual offender and any changes in required registration information to the sheriff's office of the county or counties where the sexual offender is employed, volunteers, attends an institution of higher education, or moves.

(2) The sheriff's office may post the list of sexual offenders in any public building in addition to those locations enumerated in subsection (h) of this Code section.

(k) The Georgia Crime Information Center shall create the Criminal Justice Information System network transaction screens by which appropriate officials shall enter original data required by this Code section. Screens shall also be created for sheriffs' offices for the entry of record confirmation data; employment; changes of residence, institutions of higher education, or employment; or other pertinent data to assist in sexual offender identification.

(l)(1) On at least an annual basis, the Department of Education shall obtain from the Georgia Bureau of Investigation a complete list of the names and addresses of all registered sexual offenders and shall provide access to such information, accompanied by a hold harmless provision, to each school in this state. In addition, the Department of Education shall provide information to each school in this state on accessing and retrieving from the Georgia Bureau of Investigation's website a list of the names and addresses of all registered sexual offenders.

(2) On at least an annual basis, the Department of Early Care and Learning shall provide current information to all child care programs regulated pursuant to Code Section 20-1A-10 and to all child care learning centers, day-care, group day-care, and family day-care programs regulated pursuant to Code Section 49-5-12 on accessing and retrieving from the Georgia Bureau of Investigation's website a list of the names and addresses of all registered sexual offenders and shall include, on a continuing basis, such information with each application for licensure, commissioning, or registration for early care and education programs.

(3) On at least an annual basis, the Department of Human Services shall provide current information to all long-term care facilities for children on accessing and retrieving from the Georgia Bureau of Investigation's website a list of the names and addresses of all registered sexual offenders.

(m) Within ten days of the filing of a defendant's discharge and exoneration of guilt pursuant to Article 3 of Chapter 8 of this title, the clerk of court shall transmit the order of discharge and exoneration to the Georgia Bureau of Investigation and any sheriff maintaining records required under this Code section.

(n) Any individual who:

(1) Is required to register under this Code section and who fails to comply with the requirements of this Code section;

(2) Provides false information; or

(3) Fails to respond directly to the sheriff of the county where he or she resides or sleeps within 72 hours prior to such individual's birthday

shall be guilty of a felony and shall be punished by imprisonment for not less than one nor more than 30 years; provided, however, that upon the conviction of the second offense under this subsection, the defendant shall be punished by imprisonment for not less than five nor more than 30 years.

(o) The information collected pursuant to this Code section shall be treated as private data except that:

(1) Such information may be disclosed to law enforcement agencies for law enforcement purposes;

(2) Such information may be disclosed to government agencies conducting confidential background checks; and

(3) The Georgia Bureau of Investigation or any sheriff maintaining records required under this Code section shall, in addition to the requirements of this Code section to inform the public of the presence of sexual offenders in each community, release such other relevant information collected under this Code section that is necessary to protect the public concerning sexual offenders required to register under this Code section, except that the identity of a victim of an offense that requires registration under this Code section shall not be released.

(p) The Board of Public Safety is authorized to promulgate rules and regulations necessary for the Georgia Bureau of Investigation and the Georgia Crime Information Center to implement and carry out the provisions of this Code section.

(q) Law enforcement agencies, employees of law enforcement agencies, and state officials shall be immune from liability for good faith conduct under this article. (Code 1981, § 42-1-12, enacted by Ga. L. 1996, p. 1520, § 1; Ga. L. 1997, p. 143, § 42; Ga. L. 1997, p. 380, § 1; Ga. L. 1998, p. 831, § 1; Ga. L. 1999, p. 81, § 42; Ga. L. 1999, p. 837, § 1; Ga. L. 2001, p. 1004, § 1; Ga. L. 2002, p. 571, § 1; Ga. L. 2002, p. 1400, §§ 1, 2; Ga. L. 2003, p. 140, § 42; Ga. L. 2003, p. 281, § 1; Ga. L. 2004, p. 645, § 5; Ga. L. 2004, p. 1064, §§ 1, 2; Ga. L. 2005, p. 453, § 1/HB 106; Ga. L. 2006, p. 72, § 42/SB 465; Ga. L. 2006, p. 379, § 24/HB 1059; Ga. L. 2008, p. 680, §§ 2, 3/SB 1; Ga. L. 2008, p. 810, §§ 3, 4/SB 474; Ga. L. 2009, p. 8, § 42/SB 46; Ga. L. 2009, p. 453, § 2-2/HB 228; Ga. L. 2010, p. 167, § 1/HB 651; Ga. L. 2010, p. 168, §§ 5, 6, 7, 8, 9, 10, 11/HB 571; Ga. L. 2011, p. 752, § 42/HB 142; Ga. L. 2012, p. 173, § 2-9/HB 665; Ga. L. 2013, p. 135, § 10/HB 354.)



**The 1998 amendment**, effective July 1, 1998, rewrote this Code section.

**The 1999 amendments.** — The first 1999 amendment, effective April 5, 1999, part of an Act to revise, modernize, and correct the Code, in subparagraph (b)(3)(C), inserted “and” preceding “employment” and substituted “data and” for “data, and”; substituted “his or her residence” for “the residence” in subparagraph (d)(1)(D); and substituted “in this Code section” for “herein” in paragraph (3) of subsection (i). The second 1999 amendment, effective July 1, 1999, in subsection (a), substituted “conviction resulting from an underlying sexual offense against a victim who is a minor” for “conduct that by its nature is a sexual offense against a minor as specifically designated for registration by the prosecution” in division (a)(4)(A)(vii) and inserted “, military court,” near the end of paragraph (7); rewrote subsection (b); substituted the language beginning with “person’s county of residence, either permanent or temporary” for “county where the person expects to reside” at the end of the second sentence of subsection (c); substituted “his or her residence” for “the residence” in subparagraph (d)(1)(D); added “as set forth in subparagraph (b)(3)(E) of this Code section” at the end of the first sentence in subsection (e); and rewrote subsection (g).

**The 2001 amendment**, effective July 1, 2001, in subparagraph (a)(1)(A), inserted “or who is sentenced pursuant to Article 3 of Chapter 8 of this title, relating to first offenders”; in paragraph (a)(3), substituted “crime, a plea of guilty, or a plea of nolo contendere” for “crime or upon a plea of guilty”; in subparagraph (a)(4)(A), inserted “with respect to convictions occurring on or before June 30, 2001,”; added subparagraph (a)(4)(B); redesignated former subparagraph (a)(4)(B) as present subparagraph (a)(4)(C); in paragraph (a)(7), inserted “tribal court,”; in division (b)(1)(A)(i), inserted “school address, if any,”; inserted “appropriate”, and inserted “as specified in subsection (c) of this Code section”; in division (b)(1)(A)(ii), inserted “school address, if any,”; inserted “appropriate”, and inserted “as specified in subsection (c) of this Code section”; in division (b)(1)(A)(iii), inserted “, or in a

tribal court”, inserted “school address, if any,”; inserted “appropriate”, and inserted “as specified in subsection (c) of this Code section”; in subparagraph (b)(1)(B), inserted “appropriate” and inserted “as specified in subsection (c) of this Code section”; in division (b)(3)(A)(ii), inserted “employment address, or school address,”; inserted “or sheriffs”, and deleted “residence” following “each change of”; in division (b)(3)(A)(iv), inserted “or sheriffs”; in subparagraph (b)(3)(C), inserted “including residence address, school address, and employment address”; and substituted “, employment; changes of residence, school, or employment;” for “, changes of residence, and employment” near the end; in subparagraph (b)(3)(D), substituted “, territory, or tribal authority” for “or territory” twice, inserted “appropriate”, inserted “as specified in subsection (c) of this Code section”, and deleted “of new residence” preceding “not later than ten days”; in divisions (b)(3)(E)(i) and (b)(3)(E)(ii), inserted “tribal law,”; in subsection (c), inserted “, where appropriate,” following “Information Center” and inserted “registered” and “within the sheriff’s jurisdiction” near the middle of the fourth sentence; and in subparagraph (d)(1)(D), deleted “unless the person proves that he or she has not changed his or her residence address” at the end.

**The 2002 amendments.** — The first 2002 amendment, effective July 1, 2002, added subsection (c.1). The second 2002 amendment, effective July 1, 2002, in subsection (a), added paragraphs (a)(2.1), (a)(2.2), (a)(4.1), and (a)(9); in subsection (b), throughout the subsection, inserted “and vocation” and inserted “name and”, in the first sentence of subparagraph (b)(2)(B), substituted “agency; and at least two representatives from law enforcement, each of whom is either employed by” for “agency and at least one representative from”, substituted “as a certified peace” for “who is certified as a peace”, and added “or retired from such employment”, in division (b)(3)(A)(ii), substituted “vocation address, school name, school address, or enrollment status” for “or school address”, substituted “information” for “address” three times, and inserted “and the sheriff or sheriffs of the county to which

the person is changing residence address, employment address, vocation address, school name, school address, or enrollment status,” in the first sentence of subparagraph (B)(3)(C), inserted “school name,” inserted “, enrollment status” and added “and status”, and, in the last undesignated paragraph, substituted “and school name, school address, and enrollment status” for “or school address” at the end of the second sentence and substituted “and status, school name, school address, or enrollment status” for “, or school address” in the last sentence; in subsection (c), designated the existing provisions as paragraph (c)(1) and added paragraphs (c)(2) and (c)(3); added subsection (c.1); and, in subsection (h), substituted “felony and shall be punished by imprisonment for not less than one nor more than three years” for “misdemeanor” and deleted “shall be guilty of a felony and” following “defendant”. See the Code Commission note regarding the effect of these amendments.

**The 2003 amendments.** — The first 2003 amendment, effective May 14, 2003, part of an Act to revise, modernize, and correct the Code, substituted “Criminal Justice Information System” for “criminal justice information system” in subparagraph (b)(3)(B) and paragraph (c)(1); in paragraph (c)(3), substituted “U.S.C. Section” for “U.S.C.” and substituted “Internet website” for “Web page” near the end; and substituted “one-time” for “one time” in paragraphs (c.1)(2) and (c.1)(3). The second 2003 amendment, effective May 28, 2003, rewrote this Code section.

**The 2004 amendments.** — The first 2004 amendment, effective October 1, 2004, rewrote paragraph (c.1)(3). The second 2004 amendment, effective July 1, 2004, in paragraph (a)(3), in the second sentence substituted “A” for “Unless otherwise required by federal law, a” at the beginning, deleted “not” following “shall” near the middle, and added “for the period of time prior to the defendant’s discharge after completion of his or her sentence or upon the defendant being adjudicated guilty” at the end, and added the last sentence; added subparagraph (a)(4)(D); and added subsection (n).

**The 2005 amendment,** effective July 1, 2005, added paragraph (a)(.1); deleted

“state” preceding “official” in the introductory language to paragraph (a)(1); deleted “and” at the end of subparagraph (a)(1)(B); substituted “; and” for a period at the end of subparagraph (a)(1)(C); added subparagraph (a)(1)(D); deleted subparagraph (a)(4)(D), which read: “For purposes of this paragraph, ‘criminal offense against a victim who is a minor’ shall not include conduct which, by its nature, is a sexual offense against a victim who is 13 years of age or older when the defendant enters a first offender plea pursuant to Article 3 of Chapter 8 of this title.”; added paragraph (a)(5.1); in paragraph (a)(7), deleted “or” following “molestation;” and substituted “Code Section 16-5-21, relating to aggravated assault with intent to rape” for “an offense that has as its element engaging in physical contact with another person commit such an offense”; inserted “as a sex offender” following “shall register” in division (b)(1)(A)(i); substituted “The Sexual Offender Registration Review Board” for “The Sexual Offender Review Board” in subparagraph (b)(2)(C); and rewrote subparagraph (b)(3)(D), which read: “Any person changing residence from another state or territory of the United States to Georgia who is required to register under federal law or the laws of another state, territory, or tribal authority or who has been convicted of an offense in another state, territory, or tribal authority which would require registration under this Code section if committed in this state shall comply with the registration requirements of this Code section. Such person shall register the new address, employment, and vocation information with the appropriate sheriff of the county as specified in subsection (c) of this Code section not later than ten days after the date of establishing residency in this state. Upon the person’s registration with the sheriff of the county of new residence, the sheriff or his or her designee shall forward the registration information to the Georgia Bureau of Investigation. The sheriff or his or her designee shall obtain any needed information concerning the registrant, including fingerprints and a photograph of the person if such fingerprints and photograph have not previously been obtained within the State of



Georgia. In addition, the sheriff or his or her designee shall inform the person of the duty to report any change of address as otherwise required in this Code section. The Georgia Bureau of Investigation shall forward such information in the manner described in subsection (c) of this Code section."

**The 2006 amendments.** — The first 2006 amendment, effective April 14, 2006, part of an Act to revise, modernize, and correct the Code, substituted "appropriate official" for "appropriate state official" in subparagraphs (b)(2)(A), (b)(3)(A), (b)(3)(B), and paragraph (c)(1); substituted "appropriate officials" for "appropriate state officials" in the first sentence of subparagraph (b)(3)(C); in paragraph (c.1), substituted "The Department of Early Care and Learning" for "The Office of School Readiness" at the beginning, and substituted "pursuant to Code Section 20-1A-8" for "pursuant to Code Section 20-1A-5" near the middle. The second 2006 amendment, effective July 1, 2006, substituted the present Code section for the former Code section, and placed it in newly enacted Article 2 of this chapter.

**The 2008 amendments.** — The first 2008 amendment, effective July 1, 2008, inserted "public libraries," near the end of paragraph (a)(3); and added paragraph (a)(10.1). The second 2008 amendment, effective January 1, 2009, added paragraphs (a)(21.1) and (21.2); in subparagraph (a)(16)(J), deleted "and" from the end; added present subparagraph (a)(16)(K); and redesignated former subparagraph (a)(16)(K) as present subparagraph (a)(16)(L).

**The 2009 amendments.** — The first 2009 amendment, effective April 14, 2009, part of an Act to revise, modernize, and correct the Code, revised language and punctuation in this Code section. The second 2009 amendment, effective July 1, 2009, substituted "Department of Human Services" for "Department of Human Resources" in paragraph (l)(3).

**The 2010 amendments.** — The first 2010 amendment, effective July 1, 2010, substituted "provide access to such information" for "send such list" in the middle of paragraph (l)(1). The second 2010 amendment, effective May 20, 2010, re-

wrote paragraphs (1), (9), (10), (16), and (20) of subsection (a) and deleted paragraphs (21.1) and (21.2), defining "user name" and "user password," respectively; in paragraph (b)(3), substituted "prior to moving" for "after the change of information" at the end; in paragraphs (e)(2) and (e)(5), substituted "July 1, 1996" for "July 1, 2006"; in paragraph (e)(3), inserted "victim who is a"; in paragraph (e)(4), inserted "or dangerous sexual offense" near the middle, and added "on or after July 1, 1996" at the end; in paragraph (e)(6), deleted "sexual offender" preceding "who changes" near the beginning, inserted "or any other place" near the middle, and substituted "or who has been convicted in this state of a criminal offense against a victim who is a minor or any dangerous sexual offense" for " , regardless of when the conviction occurred" at the end; in paragraph (f)(2), inserted "in person" near the beginning; added paragraph (f)(2.1); in paragraph (f)(3), substituted "each county" for "the county" and added "or sleeps" at the end; in paragraph (f)(4), inserted "or sleeps" and inserted "in person"; rewrote paragraph (f)(5); deleted former paragraph (f)(6), which read: "If convicted of a dangerous sexual offense on or after July 1, 2006, pay to the sheriff of the county where the sexual offender resides an annual registration fee of \$250.00 upon each anniversary of such registration; and"; redesignated former paragraph (f)(7) as present paragraph (f)(6), and, in paragraph (f)(6), substituted "excluding" for "including" near the end; rewrote subsection (g); in paragraph (i)(2), substituted "business days" for "working days"; in paragraph (i)(3), in the introductory language, substituted "provide a list, manually or electronically," for "post a list", and added "so that it may be available for inspection" at the end; in paragraph (i)(4), substituted "business days of the receipt of such information" for "working days"; in subsection (n), in paragraph (n)(3), substituted "of the county where he or she resides or sleeps within 72 hours prior to" for "within 72 hours of", and in the ending paragraph, substituted "one" for "ten" near the middle, and substituted "not less than five nor more than 30 years" for "life" at the end.



**The 2011 amendment**, effective May 13, 2011, part of an Act to revise, modernize, and correct the Code, substituted “paragraph (3) of this subsection” for “paragraph (3) of this Code section” in paragraph (i)(4).

**The 2012 amendment**, effective July 1, 2012, in paragraph (c)(5), inserted “in accordance with Code Sections 15-1-10, 15-6-62, and 15-6-62.1” and deleted “in accordance with Code Sections 15-1-10, 15-6-62, and 15-6-62.1” following “destroyed” at the end.

**The 2013 amendment**, effective July 1, 2013, deleted “day-care centers,” following “pre-kindergarten facilities,” in paragraph (a)(6); redesignated former paragraph (a)(10.1) as present paragraph (a)(6.1); and, in paragraph (a)(6.1), substituted “Child care learning center” for “Day-care center” at the beginning, and substituted “paragraph (2)” for “paragraph (4)” near the end.

**Cross references.** — Development of model program for educating students regarding online safety, § 20-2-149. Residing near and photographing minors by registered sexual offenders, § 42-1-15.

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 1998, commas were inserted preceding “the sheriff’s office” in the second sentence of division (b)(3)(A)(ii) and preceding “the following applies:” near the end of paragraph (1) of subsection (d).

Pursuant to Code Section 28-9-5, in 1999, substituted “subsection (g)” for “paragraph (1) of subsection (g)” in subdivisions (b)(1)(A)(i) through (b)(1)(A)(iii); and, in subsection (g), redesignated subparagraphs (A) and (B) as paragraphs (1) and (2), and redesignated subdivisions (g)(A)(i) through (g)(A)(iii) as subparagraphs (g)(1)(A) through (g)(1)(C).

The amendment of this Code section by Ga. L. 2002, p. 571, § 1, irreconcilably conflicted with and was treated as superceded by Ga. L. 2002, p. 1400, § 2. See *Count of Butts v. Strahan*, 151 Ga. 417 (1921).

Pursuant to Code Section 28-9-5, in 2005, a comma was inserted following “subparagraph shall” and a comma was inserted following “person enters the state” in the first sentence of the

undesignated paragraph in subparagraph (b)(3)(E).

The amendment of this Code section by Ga. L. 2006, p. 72, § 42, irreconcilably conflicted with and was treated as superceded by Ga. L. 2006, p. 379, § 24. See *County of Butts v. Strahan*, 151 Ga. 417 (1921).

Pursuant to Code Section 28-9-5, in 2007, “subsection” was substituted for “Code section” preceding “may petition” in the first sentence of paragraph (g)(1).

**Editor’s notes.** — Ga. L. 2004, p. 1064, § 2, not codified by the General Assembly, provides that the amendment by that act shall apply to sentences imposed on or after July 1, 2004.

Ga. L. 2006, p. 379, § 24, July 1, 2006, repealed the former Code section and enacted the current Code section covering substantially the same subject matter. The former Code section was based on Code 1981, § 42-1-12, enacted by Ga. L. 1996, p. 1520, § 1; Ga. L. 1997, p. 143, § 42; Ga. L. 1997, p. 380, § 1; Ga. L. 1998, p. 831, § 1; Ga. L. 1999, p. 81, § 42; Ga. L. 1999, p. 837, § 1; Ga. L. 2001, p. 1004, § 1; Ga. L. 2002, p. 571, § 1; Ga. L. 2002, p. 1400, §§ 1, 2; Ga. L. 2003, p. 140, § 42; Ga. L. 2003, p. 281, § 1; Ga. L. 2004, p. 645, § 5; Ga. L. 2004, p. 1064, §§ 1, 2; Ga. L. 2005, p. 453, § 1/HB 106.

Ga. L. 2006, p. 379, § 30, not codified by the General Assembly, provides, in part, that: “(b) Any person required to register pursuant to the provisions of Code Section 42-1-12, relating to the state sexual offender registry, and any person required not to reside within areas where minors congregate, as prohibited by Code Section 42-1-13, shall not be relieved of the obligation to comply with the provisions of said Code sections by the repeal and reenactment of said Code sections.

“(c) The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment.”

**Law reviews.** — For annual survey article discussing developments in criminal law, see 52 *Mercer L. Rev.* 167 (2000).

For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 11 (2006). For survey article on criminal law, see 60 Mercer L. Rev. 85 (2008). For article, “‘Sexting’ to Minors in a Rapidly Evolving Digital Age: *Frix v. State* Establishes the Applicability of Georgia’s Obscenity Statutes to Text Messages,” see 61 Mercer L. Rev. 1283 (2010).

For note, “A Mandate Without a Duty: The Apparent Scope of Georgia’s Megan’s Law,” see 15 Ga. St. U.L. Rev. 1131 (1999). For note on the 2001 amendment to O.C.G.A. § 42-1-12, see 18 Ga. St. U.L. Rev. 227 (2001). For note on the 2003 amendment to this section, see 20 Ga. St. U.L. Rev. 217 (2003).

## JUDICIAL DECISIONS

**Constitutionality.** — A defendant who entered an Alford plea in 2000 to sex offenses as a first offender was properly required to register as a sex offender pursuant to the 2005 amendment to O.C.G.A. § 42-1-12; the statute applies to first offenders convicted before July 1, 2004, and it is not an *ex post facto* law because if a defendant fails to register, the defendant will be guilty of a felony distinct from those crimes of which the defendant has been previously convicted. *Watson v. State*, 283 Ga. App. 635, 642 S.E.2d 328 (2007).

Defendant’s conviction for violating O.C.G.A. § 42-1-12(e)(3) as a result of failing to renew the defendant’s registration as a sex offender was upheld on appeal as the requirement to register as a sexual offender under § 42-1-12(e)(3) resulted in a new crime under § 42-1-12(n) and was not an *ex post facto* law. *Frazier v. State*, 284 Ga. 638, 668 S.E.2d 646 (2008).

Trial court did not err in revoking a convicted sexual offender’s probation for failing to register an address change when the offender moved into a motel because O.C.G.A. § 42-1-12 was not unconstitutionally vague in failing to define the term “temporary residence”; nor does the statute’s use of the term “temporary residence” in any way authorize or encourage arbitrary and discriminatory enforcement, but rather, § 42-1-12(a)(16) sets forth in considerable detail the information that must be reported by a sexual offender. *Dunn v. State*, 286 Ga. 238, 686 S.E.2d 772 (2009).

Trial court did not err in revoking a convicted sexual offender’s probation for failing to register an address change after the offender moved into a motel because the offender failed to establish that the

offender was treated differently from a similarly situated nonresident sexual offender entering the State; if O.C.G.A. § 42-1-12(e)(7) applies to a hypothetical nonresident sexual offender, that person must update his or her information within 72 hours of a change of address as required in § 42-1-12(f)(5), and any nonresident sexual offender who is required to register by virtue of the specification of § 42-1-12(e)(7) is equally subject to the requirement that he or she register a new address within 72 hours of changing that address and equally subject to being charged with a violation. *Dunn v. State*, 286 Ga. 238, 686 S.E.2d 772 (2009).

Because sexual offender registry requirements are regulatory, and not punitive the registry requirement is not a cruel and unusual punishment in violation of the Eighth Amendment; moreover, it is of no consequence whether a defendant has committed an offense that is “sexual” in nature before being required to register since the nature of the offense requiring the registration would not somehow change the registration requirements into a form of “punishment”. *Rainer v. State*, 286 Ga. 675, 690 S.E.2d 827 (2010).

O.C.G.A. § 42-1-12 does not violate substantive due process because § 42-1-12 advances the state’s legitimate goal of informing the public for purposes of protecting children from those who would harm them, and it is not arbitrary to believe that a child may be more at risk of harm from someone who would falsely imprison the child and who is not the child’s parent; the fact that a defendant’s offense did not involve sexual activity is of no consequence because under the statute, one only needs to have committed a criminal offense against a victim who is a



minor in order to meet the statutory definition of “sexual offender” for purposes of registration. *Rainer v. State*, 286 Ga. 675, 690 S.E.2d 827 (2010).

It is commonly understood by persons of common intelligence that criminal conduct which is a sexual offense is, at a minimum, criminal conduct which involves genitalia. Inasmuch as the offense of cruelty to children is found in Title 16 of the Official Code of Georgia Annotated and a defendant’s conduct that led to his conviction is a sexual offense, O.C.G.A. § 42-1-12 is not unconstitutionally vague. *Wiggins v. State*, 288 Ga. 169, 702 S.E.2d 865 (2010), cert. denied, 131 S. Ct. 2906, 179 L. Ed. 2d 1251, 2011 U.S. LEXIS 4005 (U.S. 2011).

**Registration requirements for homeless sex offenders unconstitutionally vague.** — Defendant was entitled to quash an indictment charging the defendant with failure to register a new residence address under O.C.G.A. § 42-1-12 as the defendant, who was homeless and not living in a shelter, was not given an objective standard or guidelines as to how to register if the defendant did not have a street or route address; thus, § 42-1-12 was unconstitutionally vague as applied to homeless sex offenders without a street or route address. *Santos v. State*, 284 Ga. 514, 668 S.E.2d 676 (2008).

**Reliance on registration database.** — Defendant sergeant reasonably relied on the Georgia Bureau of Investigation’s information that charges for failing to register as a sex offender were outstanding and that plaintiff was last known to be in the sergeant’s county; thus, verifying that the offender had not given the offender’s address to the sheriff provided sufficient probable cause to seek an arrest warrant and a Fourth Amendment challenge properly failed; O.C.G.A. § 42-1-12(c) statutorily charged the Georgia Bureau of Investigation (GBI) with providing conviction data (including names and fingerprints) of persons required to register as sex offenders to local sheriffs, who in turn were charged with maintaining a list of their names and addresses, and the sergeant was in no position to challenge the information on the GBI database. *Smith v.*

*Greenlee*, 289 Fed. Appx. 373 (11th Cir. 2008) (Unpublished).

As for defendant’s argument that registering as a sex offender would have exposed the defendant to prosecution for reentry of a previously removed alien under 8 U.S.C. § 1326, the court found no Fifth Amendment violation because the defendant could not show that anything the defendant would have been required to provide under Georgia’s sex offender statute would have confronted the defendant with a substantial hazard of self-incrimination (there were no nationality, visa, or other immigration details required to be submitted); the cases defendant cited in support of the defendant’s Fifth Amendment argument were distinguishable because those cases imposed a disclosure requirement largely designed to discover involvement in criminal activities, and the Sex Offender Registration Notification Act, 18 U.S.C. § 2250(a), was not designed to uncover criminal behavior, but was instead intended to protect the public from sex offenders by tracking their interstate movement. *United States v. Simon-Marcos*, No. 09-11189, 2010 U.S. App. LEXIS 2319 (11th Cir. Feb. 2, 2010) (Unpublished).

**Construction.** — Nothing in O.C.G.A. § 42-1-12 makes the registration requirements conditional upon a sexual offender having been told of the need to register upon release. Instead, § 42-1-12 directs the official to give the registration information to a person who is required to register, which indicates that the sexual offender has an obligation to register which is independent of the notice given by the official. *Petway v. State*, 291 Ga. App. 301, 661 S.E.2d 667 (2008).

O.C.G.A. § 42-1-12(a)(7) clearly provides that convictions for rape and crimes relating to rape require registration as a sex offender, and the statute is not unconstitutionally vague. *Jenkins v. State*, 284 Ga. 642, 670 S.E.2d 425 (2008).

O.C.G.A. § 42-1-12(e)(7) does not give a nonresident sexual offender who falls under its definition license to remain in the State for fourteen consecutive days without providing notification to the appropriate sheriff because it brings such a person



within the ambit of § 42-1-12; the obligations of those who are required to register are unaffected by the specifications in § 42-1-12(e)(7) because § 42-1-12(e) declares who shall register, and § 42-1-12(f) prescribes the obligations of those persons. *Dunn v. State*, 286 Ga. 238, 686 S.E.2d 772 (2009).

Trial court properly convicted the defendant of failing to register as a sexual offender under O.C.G.A. § 42-1-12(e)(4) because the statute was not unconstitutionally vague absent the definition of the term sexually violent offense as it included offenses in violation of O.C.G.A. § 16-6-22.2 and the defendant admitted the defendant knew the defendant was required to register. *Youmans v. State*, 291 Ga. 754, 732 S.E.2d 441 (2012).

**Counseling requirement as precondition to parole.** — A prisoner who has not been convicted of a sex offense is entitled to due process before the state declares him to be a sex offender. While classification or designation as a sex offender under Georgia law is controlled by Georgia's Sex Offender Registration law, O.C.G.A. § 42-1-12, the Parole Board's counseling precondition was insufficiently stigmatizing to constitute a deprivation of a constitutionally protected liberty interest and to support a due process entitlement. *Kramer v. Donald*, 286 Fed. Appx. 674 (11th Cir. 2008) (Unpublished).

**Cruel and unusual punishment.** — A habeas court properly ruled that an inmate's sentence of 10 years in prison for having consensual oral sex with a 15-year-old when the inmate was only 17 years old constituted cruel and unusual punishment in light of the 2006 amendments to O.C.G.A. §§ 16-6-4 and 42-1-12. As a result, the inmate's conviction was reversed and the inmate was not required to register as a sex offender. *Humphrey v. Wilson*, 282 Ga. 520, 652 S.E.2d 501 (2007).

Trial court did not err in denying the defendant's motion to strike an illegal sentence because the requirement that the defendant register as a sex offender did not violate the Eighth Amendment's proscription against the imposition of cruel and unusual punishment. *Wiggins v. State*, 288 Ga. 169, 702 S.E.2d 865 (2010),

cert. denied, 131 S. Ct. 2906, 179 L. Ed. 2d 1251, 2011 U.S. LEXIS 4005 (U.S. 2011).

**Attempt crimes required registration.** — Defendant was properly ordered to register as a sex offender because the convictions constituted criminal offenses against a victim who was a minor, pursuant to O.C.G.A. § 42-1-12(a)(4)(B), because the attempt convictions pursuant to O.C.G.A. § 16-4-1 were covered within the registration requirement; the defendant was convicted of criminal attempt to commit child molestation and criminal attempt to entice a child for indecent purposes, in violation of O.C.G.A. §§ 16-6-4(a) and 16-6-5(a), respectively, as he communicated over the Internet with a police officer who was disguised as a 14-year-old girl, and arranged to meet the alleged girl, and the fact that an actual child was not involved did not negate the offense or the need for the registration, as there was no impossibility defense. *Spivey v. State*, 274 Ga. App. 834, 619 S.E.2d 346 (2005).

Because the crime of attempt to commit rape was related to a sexually violent offense, the defendant was properly required to comply with the registration requirements of O.C.G.A. § 42-1-12, and the trial court did not err in convicting the defendant for violating the registry statute. *Jenkins v. State*, 284 Ga. 642, 670 S.E.2d 425 (2008).

**No written findings of fact or conclusions of law required.** — By its plain terms, O.C.G.A. § 42-1-12(g)(1) specifies the criterion the trial court must consider in determining whether to grant a petition for relief from the statute's registration requirements for sexual offenders, namely, the risk that the petitioner will reoffend, but the statute does not state that the trial court's order granting or denying a petition must include written findings of fact or conclusions of law. In re *Baucom*, 297 Ga. App. 661, 678 S.E.2d 118 (2009).

**Motion to quash indictment untimely.** — Defendant's motion to quash an indictment and a subsequent motion to quash a failure to register as a sex offender count under former O.C.G.A. § 42-1-12 were properly denied; the defendant had waived the right to challenge

the form of the failure to register count of the indictment because the defendant's motion was not made before entry of a not guilty plea and even if § 17-7-110 applied to the filing of the defendant's motion, it was untimely under that statute as well. *Bryson v. State*, 282 Ga. App. 36, 638 S.E.2d 181 (2006).

**Motion to sever properly denied.** —

Defendant's motion to sever the failure to register as a sex offender counts under former O.C.G.A. § 42-1-12 from the remaining aggravated sodomy and child molestation counts was properly denied as: (1) the charges involved a series of acts which were connected together; (2) the case was not so complex as to impair the jury's ability to distinguish the evidence and to apply the law intelligently to the counts as joined; and (3) the failure to report charges were legally material to the crimes against two children because the failure constituted evasive conduct that was circumstantial evidence of guilt; moreover, evidence of the conduct underlying the defendant's conviction of a sex offense in North Carolina was admissible as a similar transaction. *Bryson v. State*, 282 Ga. App. 36, 638 S.E.2d 181 (2006).

**Registration for public indecency proper.** — Offense of public indecency, O.C.G.A. § 16-6-8, was not a victimless crime and, therefore, a perpetrator thereof may have been required to register under O.C.G.A. § 42-1-12; the trial court did not err in requiring the defendant to register as a condition of the defendant's sentence for public indecency. *Brown v. State*, 270 Ga. App. 176, 605 S.E.2d 885 (2004).

**Registration as sex offender properly required.** — Defendant was properly ordered to register as a sex offender after a conviction for cruelty to a child since the cruelty as stated in the indictment was rape of a minor, a threat to arrest and jail the victim, and force used to make the victim touch defendant's penis. *Wiggins v. State*, 272 Ga. App. 414, 612 S.E.2d 598 (2005), *aff'd* in part and *rev'd* in part, 280 Ga. 268, 626 S.E.2d 118 (2006).

As the indictments made it clear that the underlying conduct for the two aggravated assaults to which the defendant

entered Alford pleas was the oral sodomy of one minor and the rape of another, and the defendant was held to have notice of all lesser crimes shown by the facts alleged in the indictment, the defendant was required to register as a sex offender under O.C.G.A. § 42-1-12. *Rogers v. State*, 297 Ga. App. 655, 678 S.E.2d 125 (2009).

Trial court properly held that the defendant, who was convicted of a statutory rape that occurred when the defendant was 18 and the victim was 13, had to register as a sex offender. Because the victim was under 14, the case did not fall within the exception of O.C.G.A. § 42-1-12(a)(9)(C) for misdemeanor statutory rape under O.C.G.A. § 16-6-3(c); moreover, the defendant was prosecuted in superior court, not juvenile court. *Planas v. State*, 296 Ga. App. 51, 673 S.E.2d 566 (2009).

Based on the allegations in the defendant's second indictment that the defendant sucked on the breasts of a minor under the age of 16, the trial court was authorized to conclude that the defendant committed a criminal offense against a victim who was a minor and was thus subject to the registration requirements and conditions in O.C.G.A. § 42-1-12. *Phillips v. State*, 298 Ga. App. 520, 680 S.E.2d 424 (2009).

Evidence was sufficient to support the defendant's conviction of failure to register as a sex offender, as required by O.C.G.A. § 42-1-12, because when the defendant was charged with failure to register the defendant was required to register as a sex offender since the defendant had been convicted of criminal sexual conduct toward a minor in violation of O.C.G.A. § 16-6-2, and the supreme court's ruling that § 16-6-2 infringed upon the right of privacy had to be applied retroactively on collateral review, but the court of appeals could not apply it in the defendant's case since it was not on collateral review; the appeal was from a conviction for failure to register as a sex offender, which was a proceeding separate from defendant's original offense, and at the time of defendant's sodomy conviction, the conduct in which the defendant engaged was against the law in Georgia. *Green v. State*, 303 Ga. App. 210, 692 S.E.2d 784 (2010).



Because the addendum to the defendant's sentence purported to impose restrictions upon the defendant's future parole, if granted, the sentence was a nullity; however, in light of the testimony and the nature of the offense of which the defendant was convicted, incest, the conditions of probation imposed were reasonable and were not vague or overly broad because several of the conditions imposed were specifically mandated by O.C.G.A. § 42-1-12, and even if the trial court had not specifically imposed sex offender registration as a condition of probation, the defendant was nonetheless required by statute to register. *Stephens v. State*, 305 Ga. App. 339, 699 S.E.2d 558 (2010).

**Electronically furnishing obscene materials required registration.** — Detective erroneously promised during an interview that a defendant would not be charged with an offense that required sex offender registration because a conviction for electronically furnishing obscene material to a minor under O.C.G.A. § 16-12-100.1 would require registration as a sex offender under O.C.G.A. § 42-1-12(e)(2); prior to the erroneous promise, the defendant's confession was voluntarily made under former O.C.G.A. § 24-3-50 (see now O.C.G.A. § 24-8-824) as the confession was made without the slightest hope of benefit. *State v. Lee*, 295 Ga. App. 49, 670 S.E.2d 879 (2008).

**Internet sex crimes required registration.** — Defendant's convictions under the computer pornography and child exploitation act, O.C.G.A. § 16-12-100.2, required registration as a sex offender pursuant to O.C.G.A. § 42-1-12, as the conviction for pornography and child exploitation under O.C.G.A. § 16-12-100.2(d) for the use of an on-line Internet service in the attempt to commit child molestation, was within the definition of a "criminal offense against a victim who was a minor," pursuant to O.C.G.A. § 42-1-12(a)(4)(B); defendant had communicated with a police officer who posed as a 14-year-old girl, sent her sexually explicit messages, and arranged a meeting with her. *Spivey v. State*, 274 Ga. App. 834, 619 S.E.2d 346 (2005).

**Registration for "criminal offense against a minor" based on communi-**

**cation over the Internet.** — Trial court properly ordered defendant to register as a sex offender, pursuant to O.C.G.A. § 42-1-12(a)(4)(B), although defendant's convictions did not fit within the category of "sexually violent offenses," pursuant to O.C.G.A. § 42-1-12(a)(7), as they were all within the "criminal offense against a victim who was a minor" category, pursuant to O.C.G.A. § 42-1-12(b)(1)(A)(i), based on a strict construction of the registration statute, pursuant to the statutory interpretation rules under O.C.G.A. § 1-3-1(a); defendant's convictions arose for communications over the Internet with a police officer who posed as a young girl, and defendant sent her sexually explicit messages and arranged a meeting with her, at which time the defendant was arrested. *Spivey v. State*, 274 Ga. App. 834, 619 S.E.2d 346 (2005).

**Registration not required for sentence imposed before effective date of act.** — O.C.G.A. § 42-1-12(a)(3) applied to sentences imposed on or after July 1, 2004, and thus, where defendant was sentenced in December 2001, the new statutory language did not apply and the defendant did not need to register as a sex offender. *State v. Plunkett*, 277 Ga. App. 605, 627 S.E.2d 182 (2006).

**Retroactive registration of sex offenders is nonpunitive.** — Trial court properly denied a defendant's motion to remove the defendant from the sex offender registry, or in the alternative to be resentenced as a first offender, as the United States Supreme Court had already determined that retroactive registration of sex offenders was nonpunitive and did not constitute an ex post facto law, and to resentence the defendant as a first offender would be in direct contravention of the plain language of O.C.G.A. §§ 17-10-6.1 and 42-1-12 since the defendant pled guilty but mentally ill to kidnapping a child under the age of 14, which was a serious violent felony. *Finnicum v. State*, 296 Ga. App. 86, 673 S.E.2d 604 (2009).

**Registration for first offender.** — Georgia superior court properly required a first offender to register as a sex offender pursuant to O.C.G.A. § 42-1-12, as both the 2005 and 2006 amendments to



the statute dictated registration, and despite the fact that registration was not part of the first offender's plea agreement, as neither the court nor the prosecutor had the power to exempt the first offender from the adoption of new rules regarding registration entered after the plea. *Peters v. Donald*, 282 Ga. App. 714, 639 S.E.2d 345 (2006).

**Sex offender registration not required after successful completion of first offender sentence.** — Defendant was not required to register as a sexual offender because the defendant successfully completed a first-offender sentence for statutory rape and burglary charges, and a "conviction" under O.C.G.A. § 42-1-12(a)(8) did not include a discharge without an adjudication of guilt following the successful completion of a first offender sentence; the plain language of O.C.G.A. § 42-8-62(a) provided that, with certain exceptions, once a first offender was discharged without an adjudication of guilt, he or she stood completely exonerated and was not considered as having been convicted of a crime. *Jackson v. State*, 299 Ga. App. 356, 683 S.E.2d 60 (2009).

**Residence, not domicile.** — Trial court properly denied a defendant's motion for a directed verdict on a count alleging that the defendant failed to register as a sex offender under former O.C.G.A. § 42-1-12(b)(4)(B) as that section did not speak to the concept of "domicile," but to residence address and moving and residence included an intent to live in a place for the time being; although the state did not show exactly where the defendant resided after leaving the county, it showed that the defendant left the county and lived outside the state for more than a year without informing the county sheriff of a change in residence address, as required by law. *Bryson v. State*, 282 Ga. App. 36, 638 S.E.2d 181 (2006).

In a declaratory action suit brought by a registered sex offender, former O.C.G.A. § 42-1-15(a) was held unconstitutional as to the sex offender's residence, which was acquired prior to a child care facility locating itself within 1,000 feet of the property, as forcing the sex offender from the home was a regulatory taking of the property

without just and adequate compensation. However, no regulatory taking occurred with regard to prohibiting the sex offender from physically working at a business, pursuant to former § 42-1-15(b)(1), in which the sex offender held an ownership interest in as there existed no prohibition on owning a business within 1,000 feet of any child care facility, church, school, or other area where minors congregated and the sex offender failed to show that physically working at the premises was necessary. *Mann v. Ga. Dep't of Corr.*, 282 Ga. 754, 653 S.E.2d 740 (2007).

**Change of residence.** — Trial court's conclusion that the state failed to present any competent evidence showing that the defendant had changed residences, was erroneous because in its assessment of the evidence, the trial court erroneously determined that an investigator's testimony amounted to inadmissible hearsay; the investigator's testimony as to the declaration of the defendant's father that the defendant no longer lived at that residence was admissible as a prior inconsistent statement and was admissible as substantive evidence of the defendant's guilt. Moreover, the circumstances presented by the evidence would authorize a rational trier of fact to find that the defendant had intended to change residences without notifying the local authorities as required; the evidence showed that the defendant had been living at the defendant's mother's residence for over two weeks, had not returned to the defendant's father's residence by the time the defendant was arrested, had failed to report for a scheduled meeting with a probation officer, and had not contacted the probation officer to explain the defendant's failure to report for the meeting or to provide any information as to the defendant's current residential status. *State v. Canup*, 300 Ga. App. 678, 686 S.E.2d 275 (2009).

**Evidence of convictions admissible in trial for failure to notify of address change.** — In a defendant's trial for failure to notify the sheriff of changes in the defendant's address as required by O.C.G.A. § 42-1-12 based on the defendant's past rape conviction, the defendant's counsel was not ineffective in fail-

ing to object to admission of the defendant's past convictions for burglarizing and robbing the defendant's parents. Such evidence was admissible to impeach the defendant's testimony that the defendant had lived with the defendant's parents at their home without interruption. *Relaford v. State*, 306 Ga. App. 549, 702 S.E.2d 776 (2010), cert. denied, No. S11C0429, 2011 Ga. LEXIS 576.

**Registration requirement for first offender under former law.** — Trial court's denial of a defendant's motion for an out-of-time appeal was proper with respect to the defendant's claim that counsel was ineffective for failing to object to testimony by a probation officer, as the officer's statement that under former O.C.G.A. § 42-1-2(a)(3), the defendant did not have to register as a sex offender if the defendant was afforded treatment as a first offender was a correct statement of law at the time; accordingly, counsel's failure to object thereto was not ineffectiveness as any such objection would have lacked merit. *Ethridge v. State*, 283 Ga. App. 289, 641 S.E.2d 282 (2007).

**Denial of petition for release from requirement to register.** — A trial court did not abuse the court's discretion by denying defendant's petition for release from the requirement to register as a sexual offender for life as defendant failed to make a prima facie showing that defendant was no longer a substantial risk of reoffending since an agency abuse case was pending against defendant, which required a child of defendant to not bring any children around defendant, and defendant characterized the conduct involving the child molestation of defendant's three children as a mistake which everyone makes. *Miller v. State*, 291 Ga. App. 478, 662 S.E.2d 261 (2008).

Trial court erred by denying a defendant's petition for release from the requirement that the defendant register as a sexual offender, pursuant to O.C.G.A. § 42-1-12, since the defendant's Texas conviction involving the use of the defendant's position as a clergyman to sexually assault two victims was not similar enough to any Georgia criminal statute that would have found the defendant to have been convicted of committing a dan-

gerous sexual offense as that term was defined in § 42-1-12(1)(10)(A). *Sharma v. State*, 294 Ga. App. 783, 670 S.E.2d 494 (2008).

Trial court did not abuse the court's discretion by denying a defendant's petition seeking relief from the sexual offender registration requirements, pursuant to O.C.G.A. § 42-1-12(g)(1), because the defendant failed to provide a report from a licensed psychiatrist that allegedly set forth an opinion that the defendant posed no threat whatsoever of reoffending. Further, the defendant failed to provide any additional information regarding the underlying conduct for the out-of-state conviction that required the registration. *In re Baucom*, 297 Ga. App. 661, 678 S.E.2d 118 (2009).

Defendant's confinement in a probation detention center was not equivalent to confinement in prison for purposes of O.C.G.A. § 42-1-12(g) because under O.C.G.A. § 42-8-34.1(c), such centers were alternatives to confinement in prison, and therefore the 10-year waiting period for release from sex offender registration requirements did not begin running upon the defendant's release from the center, but from the date the defendant was released from probation. *In re White*, 306 Ga. App. 365, 702 S.E.2d 694 (2010).

**Probation condition overbroad and vague.** — Upon convicting the defendant of sexual battery under O.C.G.A. § 16-6-22.1, special probation conditions 4, 5, and 6 were erroneously imposed, as those conditions lacked reasonable specificity and encompassed groups and locations not rationally related to the sentencing objectives and failed to give the defendant notice of either the conduct or the groups to avoid. *Grovenstein v. State*, 282 Ga. App. 109, 637 S.E.2d 821 (2006).

**No contest plea properly admitted.** — Trial court did not err in admitting into evidence a no contest plea and in "making reference" to the plea with regard to the similar transaction evidence as the defendant's failure to object to the introduction of the evidence precluded review of the issue on appeal; further, the plea was admissible to show a conviction for purposes of the defendant's alleged failure to



register as a sex offender under former O.C.G.A. § 42-1-12 and the jury was permitted to consider the plea as similar transaction evidence. *Bryson v. State*, 282 Ga. App. 36, 638 S.E.2d 181 (2006).

**Conduct alleged in indictment satisfied definition of sexual offense and required registration.** — As a defendant entered an Alford plea to two counts of cruelty to children by committing the acts alleged in the indictment, defendant acknowledged touching the breast and buttocks of the 14-year-old victim and although the defendant did not plead guilty to a sexual offense, the defendant pled guilty to conduct which, by its nature, was a sexual offense against a minor. Therefore, the defendant was required to register as a sexual offender under O.C.G.A. § 42-1-12(e)(1). *Morrell v. State*, 297 Ga. App. 592, 677 S.E.2d 771 (2009).

**Failure to register results in new crime.** — A defendant's failure to abide by the requirement to register as a sexual offender, pursuant to O.C.G.A. § 42-1-12, would result in a new crime, thus, § 42-1-12 is not an ex post facto law. *Miller v. State*, 291 Ga. App. 478, 662 S.E.2d 261 (2008).

**Registration requirement not sentence or punishment.** — Requiring a defendant who had been convicted of aggravated child molestation to submit to lifetime registration as a sex offender under O.C.G.A. § 42-1-12 did not exceed the maximum sentence allowed under O.C.G.A. § 16-6-4, as such registration was not a sentence or a punishment. *Hollie v. State*, 298 Ga. App. 1, 679 S.E.2d 47 (2009), *aff'd*, 287 Ga. 389, 696 S.E.2d 642 (2010).

**Registration is not a sentence or punishment.** — That the sentencing judge did not impose sexual offender registration as a condition of probation did not excuse the defendant from registering as registration was not a sentence or a punishment. *Rogers v. State*, 297 Ga. App. 655, 678 S.E.2d 125 (2009).

**Requiring registration as special condition of probation proper.** — Trial court did not err in denying the defendant's motion to strike an illegal sentence because the special condition of probation the trial court imposed, requiring the de-

fendant to register as a sex offender, was required by the sex-offender registration statute, O.C.G.A. § 42-1-12. Moreover, the facts supporting the requirement that the defendant register as a sex offender, that the defendant committed conduct that was a sexual offense against a minor, were found by the jury. The sex-offender registry requirement is regulatory and not punitive in nature. *Wiggins v. State*, 288 Ga. 169, 702 S.E.2d 865 (2010), *cert. denied*, 131 S. Ct. 2906, 179 L. Ed. 2d 1251, 2011 U.S. LEXIS 4005 (U.S. 2011).

**Sentence of 30 years, 15 to serve, proper.** — Defendant who was indicted for violating O.C.G.A. § 42-1-12 "on or about April 4, 2007, the exact date being unknown," was properly sentenced to 30 years, to serve 15 imprisoned, because an amendment to § 42-1-12 that was effective July 1, 2006, increased the sentencing range from one-to-three years to ten-to-thirty years. *Relaford v. State*, 306 Ga. App. 549, 702 S.E.2d 776 (2010), *cert. denied*, No. S11C0429, 2011 Ga. LEXIS 576.

**Life sentence for failing to register unconstitutional.** — Imposition of a mandatory sentence of life imprisonment imposed against a defendant, who was a second time offender, for failing to register as a sexual offender was held unconstitutional as grossly disproportionate to the crime of failing to register. *Bradshaw v. State*, 284 Ga. 675, 671 S.E.2d 485 (2008).

**Lack of knowledge of registration requirements not a defense.** — Defendant's conviction for filing false information with the Georgia Sex Offender Registry, in violation of O.C.G.A. § 42-1-12(n), was upheld. The defendant's claimed lack of knowledge of the registration requirements was no excuse and was refuted by the fact that the defendant had filed registration notification forms. *Scott v. State*, 303 Ga. App. 672, 695 S.E.2d 71 (2010).

**Failure to advise defendant of requirement to register as sex offender.** — Trial court erred in denying the defendant's motion to withdraw the defendant's guilty plea to two counts of child molestation because defendant's trial counsel failed to advise the defendant that entering a plea of guilty to child molestation would necessitate that the defendant com-



ply with the requirements of the state's sex offender registry statute, O.C.G.A. § 42-1-12; the defendant was subject to the sex offender registration requirements at the time that the defendant entered into defendant's plea, the terms of the sex offender registry statute were succinct, clear, and explicit in setting forth the consequences of defendant's guilty plea, and the defendant's trial counsel could have readily determined that the defendant was required to register and conveyed that information to the defen-

dant. *Taylor v. State*, 304 Ga. App. 878, 698 S.E.2d 384 (2010).

Trial counsel's failure to advise a client that pleading guilty will require him to register as a sex offender is constitutionally deficient performance. *Taylor v. State*, 304 Ga. App. 878, 698 S.E.2d 384 (2010).

**Cited in** *Turner v. State*, 231 Ga. App. 747, 500 S.E.2d 628 (1998); *Staley v. State*, 233 Ga. App. 597, 505 S.E.2d 491 (1998); *State v. Stulb*, 296 Ga. App. 510, 675 S.E.2d 253 (2009).

## OPINIONS OF THE ATTORNEY GENERAL

**Release of information by sheriff.** — The sheriff must release relevant information relating to sexually violent predators; however, the sheriff is given the authority

to determine what information and in what manner such information will be released. 1997 Op. Att'y Gen. No. U97-23.

## RESEARCH REFERENCES

**ALR.** — Validity, construction, and application of state statute including “sexually motivated offenses” within definition of sex offense for purposes of sentencing or classification of defendant as sex offender, 30 ALR6th 373.

Validity, construction, and application of state statutes imposing criminal penalties for failure to register as required under sex offender or other criminal registration statutes, 33 ALR6th 91.

State statutes or ordinances requiring persons previously convicted of crime to register with authorities as applied to juvenile offenders — Constitutional issues, 37 ALR6th 55.

State statutes or ordinances requiring persons previously convicted of crime to register with authorities as applied to juvenile offenders — duty to register, requirements for registration, and procedural matters, 38 ALR6th 1.

State statutes or ordinances requiring persons previously convicted of crime to register with authorities as applied to

juvenile offenders — expungement, stay or deferral, exceptions, exemptions, and waiver, 39 ALR6th 577.

Court's duty to advise sex offender as to sex offender registration consequences or other restrictions arising from plea of guilty, or to determine that offender is advised thereof, 41 ALR6th 141.

Application of *Apprendi v. New Jersey*, 530 U.S. 466, 120 S. Ct. 2348, 147 L. Ed. 2d 435 (2000), and *Blakely v. Washington*, 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d 403, 6 A.L.R. Fed. 2d 619 (2004), to Sex Offender Registration Statutes, 51 ALR6th 139.

Validity, construction, and application of state sex offender registration statutes concerning level of classification — Initial classification determination, 65 ALR6th 1.

Validity, construction, and application of federal Sex Offender Registration and Notification Act (SORNA), 42 U.S.C.A. §§ 16901 et seq., its enforcement provision, 18 U.S.C.A. § 2250, and associated regulations, 30 ALR Fed. 2d 213.

**42-1-13. Sexual Offender Registration Review Board; composition; appointment; administration and duties; immunity from liability.**

(a) The Sexual Offender Registration Review Board shall be composed of three professionals licensed under Title 43 and knowledgeable in the field of the behavior and treatment of sexual offenders; at least one representative from a victims' rights advocacy group or agency; and at least two representatives from law enforcement, each of whom is either employed by a law enforcement agency as a certified peace officer under Title 35 or retired from such employment. The members of the board shall be appointed by the commissioner of behavioral health and developmental disabilities for terms of four years. On and after July 1, 2006, successors to the members of the board shall be appointed by the Governor. Members of the board shall take office on the first day of September immediately following the expired term of that office and shall serve for a term of four years and until the appointment of their respective successors. No member shall serve on the board more than two consecutive terms. Vacancies occurring on the board, other than those caused by expiration of a term of office, shall be filled in the same manner as the original appointment to the position vacated for the remainder of the unexpired term and until a successor is appointed. Members shall be entitled to an expense allowance and travel cost reimbursement the same as members of certain other boards and commissions as provided in Code Section 45-7-21.

(b) The board shall be attached to the Department of Behavioral Health and Developmental Disabilities for administrative purposes and, provided there is adequate funding, shall:

(1) Exercise its quasi-judicial, rule-making, or policy-making functions independently of the department and without approval or control of the department;

(2) Prepare its budget, if any, and submit its budgetary requests, if any, through the department; and

(3) Hire its own personnel, including but not limited to administrative personnel and clinical evaluators.

(c) Any investigator who, as of June 30, 2012, was employed by the board shall be transferred to the Georgia Bureau of Investigation on July 1, 2012, and shall no longer be under the administration or supervision of the board, except as required to provide the board with information as set forth in paragraph (15) of subsection (a) of Code Section 35-3-4. The executive director of the board shall arrange administratively for the transfer of any equipment relating to the transfer of such personnel.

(d) Members of the board shall be immune from liability for good faith conduct under this article. (Code 1981, § 42-1-13, enacted by Ga. L. 2006, p. 379, § 24/HB 1059; Ga. L. 2009, p. 453, §§ 3-2, 3-3/HB 228; Ga. L. 2012, p. 985, § 2/HB 895.)

**The 2009 amendment**, effective July 1, 2009, substituted “commissioner of behavioral health and developmental disabilities” for “commissioner of human resources” in the second sentence of subsection (a); and substituted “Department of Behavioral Health and Developmental Disabilities” for “Department of Human Resources” in subsection (b).

**The 2012 amendment**, effective July 1, 2012, substituted “, including but not limited to administrative personnel and clinical evaluators” for “if authorized by the Constitution of this state or by statute or if the General Assembly provides or authorizes the expenditure of funds therefor” in paragraph (b)(3); added subsection (c); and redesignated former subsection (c) as present subsection (d).

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2012, “paragraph (15) of subsection (a) of Code Section 35-3-4” was substituted for “paragraph (14) of subsection (a) of Code Section 35-3-4” in subsection (c).

**Editor’s notes.** — For information as to the effective date of this Code section, see the effective date note at the beginning of this article.

Ga. L. 2006, p. 379, § 24, July 1, 2006, repealed the former Code section and enacted the current Code section. The former Code section, pertaining to registered

sex offenders residing within areas in which minors congregate, was based on Code 1981, § 42-1-13, enacted by Ga. L. 2003, p. 878, § 1. For present similar provisions, see Code Section 42-1-15.

Ga. L. 2006, p. 379, § 30, not codified by the General Assembly, provides, in part, that: “(b) Any person required to register pursuant to the provisions of Code Section 42-1-12, relating to the state sexual offender registry, and any person required not to reside within areas where minors congregate, as prohibited by Code Section 42-1-13, shall not be relieved of the obligation to comply with the provisions of said Code sections by the repeal and reenactment of said Code sections.

“(c) The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment.”

**Law reviews.** — For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 11 (2006). For annual survey on administrative law, see 64 Mercer L. Rev. 39 (2012).

For note, “Banishing Acts: How Far May States Go to Keep Convicted Sex Offenders Away from Children?,” see 40 Ga. L. Rev. 961 (2006).

## JUDICIAL DECISIONS

**Registration for first offender.** — Georgia superior court properly required a first offender to register as a sex offender pursuant to O.C.G.A. § 42-1-12, as both the 2005 and 2006 amendments to the statute dictated registration, and despite the fact that registration was not part of the first offender’s plea agreement,

as neither the court nor the prosecutor had the power to exempt the first offender from the adoption of new rules regarding registration entered after the plea. *Peters v. Donald*, 282 Ga. App. 714, 639 S.E.2d 345 (2006).

**Cited in** *Watson v. State*, 283 Ga. App. 635, 642 S.E.2d 328 (2007).



## RESEARCH REFERENCES

**ALR.** — Validity of statutes imposing residency restrictions on registered sex offenders, 25 ALR6th 227.

Validity, construction, and application of federal Sex Offender Registration and

Notification Act (SORNA), 42 U.S.C.A. §§ 16901 et seq., its enforcement provision, 18 U.S.C.A. § 2250, and associated regulations, 30 ALR Fed. 2d 213.

**42-1-14. Risk assessment classification; classification as “sexually dangerous predator”; electronic monitoring.**

(a)(1) The board shall determine the likelihood that a sexual offender will engage in another crime against a victim who is a minor or a dangerous sexual offense. The board shall make such determination for any sexual offender convicted on or after July 1, 2006, of a criminal offense against a victim who is a minor or a dangerous sexual offense and for any sexual offender incarcerated on July 1, 2006, but convicted prior to July 1, 2006, of a criminal offense against a victim who is a minor. Any sexual offender who changes residence from another state or territory of the United States or any other place to this state and who is not already designated under Georgia law as a sexually dangerous predator, sexual predator, or a sexually violent predator shall have his or her required registration information forwarded by the sheriff of his or her county of registration to the board for the purpose of risk assessment classification. The board shall also make such determination upon the request of a superior court judge for purposes of considering a petition to be released from registration restrictions or residency or employment restrictions as provided for in Code Section 42-1-19.

(2) A sexual offender shall be placed into Level I risk assessment classification, Level II risk assessment classification, or sexually dangerous predator classification based upon the board’s assessment criteria and information obtained and reviewed by the board. The sexual offender may provide the board with information, including, but not limited to, psychological evaluations, sexual history polygraph information, treatment history, and personal, social, educational, and work history and may agree to submit to a psychosexual evaluation or sexual history polygraph conducted by the board. If the sexual offender has undergone treatment through the Department of Corrections, such treatment records shall also be submitted to the board for evaluation. The prosecuting attorney shall provide the board with any information available to assist the board in rendering an opinion, including, but not limited to, criminal history and records related to previous criminal history. The board shall utilize the Georgia Bureau of Investigation to assist it in obtaining information relative to its evaluation of sexual offenders and the Georgia Bureau of Investigation shall provide the board with information as re-

quested by the board. The board shall be authorized to obtain information from supervision records of the Board of Pardons and Paroles regarding such sexual offender, but such records shall remain confidential state secrets in accordance with Code Section 42-9-53 and shall not be made available to any other person or entity or be subject to subpoena unless declassified by the State Board of Pardons and Paroles. The clerk of court shall send a copy of the sexual offender's conviction to the board and notify the board that a sexual offender's evaluation will need to be performed. The board shall render its recommendation for risk assessment classification within:

(A) Sixty days of receipt of a request for an evaluation if the sexual offender is being sentenced pursuant to subsection (c) of Code Section 17-10-6.2;

(B) Six months prior to the sexual offender's proposed release from confinement if the offender is incarcerated;

(C) Sixty days of receipt of the required registration information from the sheriff when the sexual offender changes residence from another state or territory of the United States or any other place to this state and is not already classified;

(D) Sixty days if the sexual offender is sentenced to a probated or suspended sentence; and

(E) Ninety days if such classification is requested by the court pursuant to a petition filed under Code Section 42-1-19.

(3) The board shall notify the sex offender by first-class mail of its determination of risk assessment classification and shall send a copy of such classification to the Georgia Bureau of Investigation, the Department of Corrections, the sheriff of the county where the sexual offender is registered, and the sentencing court, if applicable.

(b) If the board determines that a sexual offender should be classified as a Level II risk assessment classification or as a sexually dangerous predator, the sexual offender may petition the board to reevaluate his or her classification. To file a petition for reevaluation, the sexual offender shall be required to submit his or her written petition for reevaluation to the board within 30 days from the date of the letter notifying the sexual offender of his or her classification. The sexual offender shall have 60 days from the date of the notification letter to submit information as provided in subsection (a) of this Code section in support of the sexual offender's petition for reevaluation. If the sexual offender fails to submit the petition or supporting documents within the time limits provided, the classification shall be final. The board shall notify the sexual offender by first-class mail of its decision on the petition for reevaluation of risk assessment classification and shall send a copy of

such notification to the Georgia Bureau of Investigation, the Department of Corrections, the sheriff of the county where the sexual offender is registered, and the sentencing court, if applicable.

(c) A sexual offender who is classified by the board as a Level II risk assessment classification or as a sexually dangerous predator may file a petition for judicial review of his or her classification within 30 days of the date of the notification letter or, if the sexual offender has requested reevaluation pursuant to subsection (b) of this Code section, within 30 days of the date of the letter denying the petition for reevaluation. The petition for judicial review shall name the board as defendant, and the petition shall be filed in the superior court of the county where the offices of the board are located. Within 30 days after service of the appeal on the board, the board shall submit a summary of its findings to the court and mail a copy, by first-class mail, to the sexual offender. The findings of the board shall be considered prima-facie evidence of the classification. The court shall also consider any relevant evidence submitted, and such evidence and documentation shall be mailed to the parties as well as submitted to the court. The court may hold a hearing to determine the issue of classification. The court may uphold the classification of the board, or, if the court finds by a preponderance of the evidence that the sexual offender is not placed in the appropriate classification level, the court shall place the sexual offender in the appropriate risk assessment classification. The court's determination shall be forwarded by the clerk of the court to the board, the sexual offender, the Georgia Bureau of Investigation, and the sheriff of the county where the sexual offender is registered.

(d) Any individual who was classified as a sexually violent predator prior to July 1, 2006, shall be classified as a sexually dangerous predator on and after July 1, 2006.

(e) Any sexually dangerous predator shall be required to wear an electronic monitoring system that shall have, at a minimum:

(1) The capacity to locate and record the location of a sexually dangerous predator by a link to a global positioning satellite system;

(2) The capacity to timely report or record a sexually dangerous predator's presence near or within a crime scene or in a prohibited area or the sexually dangerous predator's departure from specific geographic locations; and

(3) An alarm that is automatically activated and broadcasts the sexually dangerous predator's location if the global positioning satellite monitor is removed or tampered with by anyone other than a law enforcement official designated to maintain and remove or replace the equipment.

Such electronic monitoring system shall be worn by a sexually dangerous predator for the remainder of his or her natural life. The sexually



dangerous predator shall pay the cost of such system to the Department of Corrections if the sexually dangerous predator is on probation; to the State Board of Pardons and Paroles if the sexually dangerous predator is on parole; and to the sheriff after the sexually dangerous predator completes his or her term of probation and parole or if the sexually dangerous predator has moved to this state from another state, territory, or country. The electronic monitoring system shall be placed upon the sexually dangerous predator prior to his or her release from confinement. If the sexual offender is not in custody, within 72 hours of the decision classifying the sexual offender as a sexually dangerous predator in accordance with subsection (b) of this Code section, the sexually dangerous predator shall report to the sheriff of the county of his or her residence for purposes of having the electronic monitoring system placed on the sexually dangerous predator.

(f) In addition to the requirements of registration for all sexual offenders, a sexually dangerous predator shall report to the sheriff of the county where such predator resides six months following his or her birth month and update or verify his or her required registration information. (Code 1981, § 42-1-14, enacted by Ga. L. 2006, p. 379, § 24/HB 1059; Ga. L. 2010, p. 168, § 12/HB 571; Ga. L. 2010, p. 878, § 42/HB 1387; Ga. L. 2011, p. 752, § 42/HB 142; Ga. L. 2012, p. 985, § 3/HB 895; Ga. L. 2013, p. 1056, § 1/HB 122.)

**The 2010 amendments.** — The first 2010 amendment, effective May 20, 2010, rewrote subsections (a) through (c); in subsection (e), in the concluding paragraph, inserted “State” in the second sentence, deleted “by the court” preceding “in accordance with” and deleted “or a final decision pursuant to subsection (c) of this Code section, whichever applies to the sexual offender’s situation” following “of this Code section” in the last sentence. The second 2010 amendment, effective June 3, 2010, part of an Act to revise, modernize, and correct the Code, substituted “treatment history, and personal, social, educational, and work history and may” for “treatment history, personal, social, educational, and work history, and may” in subsection (a); and substituted “the State Board of Pardons and Paroles” for “the Board of Pardons and Paroles” in the undesignated text at the end of subsection (e). See the editor’s note regarding the effect of these amendments.

**The 2011 amendment,** effective May 13, 2011, part of an Act to revise, modernize, and correct the Code, revised punctu-

ation in the second sentence of paragraph (a)(2).

**The 2012 amendment,** effective July 1, 2012, added the fifth sentence of paragraph (a)(2).

**The 2013 amendment,** effective July 1, 2013, added the sixth sentence in paragraph (a)(2).

**Editor’s notes.** — Ga. L. 2006, p. 379, § 30, not codified by the General Assembly, provides, in part, that: “The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment.”

Ga. L. 2010, p. 878, § 54(e), not codified by the General Assembly, provides: “In the event of an irreconcilable conflict between a provision in Sections 1 through 53 of this Act and a provision of another Act enacted at the 2010 regular session of the General Assembly, the provision of such other Act shall control over the conflicting provision

in Sections 1 through 53 of this Act to the extent of the conflict.” Accordingly, the amendment to subsection (a) of this Code section by Ga. L. 2010, 878, § 42, was not given effect.

**Law reviews.** — For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 11 (2006).

### JUDICIAL DECISIONS

**Cited** in Taylor v. State, 304 Ga. App. 878, 698 S.E.2d 384 (2010).

### RESEARCH REFERENCES

**ALR.** — Admissibility of actuarial risk assessment testimony in proceeding to commit sex offender, 20 ALR6th 607.

Validity, construction, and application of state sex offender registration statutes concerning level of classification — Claims for downward departure, 66 ALR6th 1.

Validity, construction, and application of state sex offender registration statutes

concerning level of classification — Claims challenging upward departure, 67 ALR6th 1.

Validity, construction, and application of federal Sex Offender Registration and Notification Act (SORNA), 42 U.S.C.A. §§ 16901 et seq., its enforcement provision, 18 U.S.C.A. § 2250, and associated regulations, 30 ALR Fed. 2d 213.

### **42-1-15. Restriction on registered offenders residing, working, or loitering within certain distance of child care facilities, churches, schools, or areas where minors congregate; penalty for violations; civil causes of action.**

(a) As used in this Code section, the term:

(1) “Individual” means a person who is required to register pursuant to Code Section 42-1-12.

(2) “Lease” means a right of occupancy pursuant to a written and valid lease or rental agreement.

(3) “Minor” means any person who is under 18 years of age.

(4) “Volunteer” means to engage in an activity in which one could be, and ordinarily would be, employed for compensation, and which activity involves working with, assisting, or being engaged in activities with minors; provided, however, that such term shall not include participating in activities limited to persons who are 18 years of age or older or participating in worship services or engaging in religious activities or activities at a place of worship that do not include supervising, teaching, directing, or otherwise participating with minors who are not supervised by an adult who is not an individual required to register pursuant to Code Section 42-1-12.

(b) On and after July 1, 2008, no individual shall reside within 1,000 feet of any child care facility, church, school, or area where minors

congregate if the commission of the act for which such individual is required to register occurred on or after July 1, 2008. Such distance shall be determined by measuring from the outer boundary of the property on which the individual resides to the outer boundary of the property of the child care facility, church, school, or area where minors congregate at their closest points.

(c)(1) On and after July 1, 2008, no individual shall be employed by or volunteer at any child care facility, school, or church or by or at any business or entity that is located within 1,000 feet of a child care facility, a school, or a church if the commission of the act for which such individual is required to register occurred on or after July 1, 2008. Such distance shall be determined by measuring from the outer boundary of the property of the location at which such individual is employed or volunteers to the outer boundary of the child care facility, school, or church at their closest points.

(2) On or after July 1, 2008, no individual who is a sexually dangerous predator shall be employed by or volunteer at any business or entity that is located within 1,000 feet of an area where minors congregate if the commission of the act for which such individual is required to register occurred on or after July 1, 2008. Such distance shall be determined by measuring from the outer boundary of the property of the location at which the sexually dangerous predator is employed or volunteers to the outer boundary of the area where minors congregate at their closest points.

(d) Notwithstanding any ordinance or resolution adopted pursuant to Code Section 16-6-24 or subsection (d) of Code Section 16-11-36, it shall be unlawful for any individual to loiter, as prohibited by Code Section 16-11-36, at any child care facility, school, or area where minors congregate.

(e)(1) If an individual owns or leases real property and resides on such property and a child care facility, church, school, or area where minors congregate thereafter locates itself within 1,000 feet of such property, or if an individual has established employment at a location and a child care facility, church, or school thereafter locates itself within 1,000 feet of such employment, or if a sexual predator has established employment and an area where minors congregate thereafter locates itself within 1,000 feet of such employment, such individual shall not be guilty of a violation of subsection (b) or (c) of this Code section, as applicable, if such individual successfully complies with subsection (f) of this Code section.

(2) An individual owning or leasing real property and residing on such property or being employed within 1,000 feet of a prohibited location, as specified in subsection (b) or (c) of this Code section, shall



not be guilty of a violation of this Code section if such individual had established such property ownership, leasehold, or employment prior to July 1, 2008, and such individual successfully complies with subsection (f) of this Code section.

(f)(1) If an individual is notified that he or she is in violation of subsection (b) or (c) of this Code section, and if such individual claims that he or she is exempt from such prohibition pursuant to subsection (e) of this Code section, such individual shall provide sufficient proof demonstrating his or her exemption to the sheriff of the county where the individual is registered within ten days of being notified of any such violation.

(2) For purposes of providing proof of residence, the individual may provide a driver's license, government issued identification, or any other documentation evidencing where the individual's habitation is fixed. For purposes of providing proof of property ownership, the individual shall provide a copy of his or her warranty deed, quitclaim deed, or voluntary deed, or other documentation evidencing property ownership.

(3) For purposes of providing proof of a leasehold, the individual shall provide a copy of the applicable lease agreement. Leasehold exemptions shall only be for the duration of the executed lease.

(4) For purposes of providing proof of employment, the individual may provide an Internal Revenue Service Form W-2, a pay check, or a notarized verification of employment from the individual's employer, or other documentation evidencing employment. Such employment documentation shall evidence the location in which such individual actually carries out or performs the functions of his or her job.

(5) Documentation provided pursuant to this subsection may be required to be date specific, depending upon the individual's exemption claim.

(g) Any individual who knowingly violates this Code section shall be guilty of a felony and shall be punished by imprisonment for not less than ten nor more than 30 years.

(h) Nothing in this Code section shall create, either directly or indirectly, any civil cause of action against or result in criminal prosecution of any person, firm, corporation, partnership, trust, or association other than an individual required to be registered under Code Section 42-1-12. (Code 1981, § 42-1-15, enacted by Ga. L. 2008, p. 680, § 4/SB 1; Ga. L. 2010, p. 168, § 13/HB 571.)

**Effective date.** — This Code section became effective July 1, 2008.

**The 2010 amendment,** effective May 20, 2010, added present paragraphs (a)(2)

and (a)(4); redesignated former paragraph (a)(2) as present paragraph (a)(3), and, in paragraph (a)(3), substituted “any person” for “any individual”; deleted former paragraph (a)(3), which read: “‘Photograph’ means to take any picture, film or digital photograph, motion picture film, videotape, or similar visual representation or image of a person.”; in subsection (b), and, in paragraphs (c)(1) and (c)(2), in the first sentences, added “On and after July 1, 2008,” at the beginning, and “if the commission of the act for which such individual is required to register occurred on or after July 1, 2008” at the end; deleted former subsection (d), which read: “No individual shall intentionally photograph a minor without the consent of the minor’s parent or guardian.”; redesignated former subsection (e) as present subsection (d); in present subsection (d), deleted “required to register pursuant to Code Section 42-1-12” following “any individual”; redesignated former subsection (f) as present subsection (e); in present paragraph (e)(1), inserted “or leases” near the beginning, and substituted “subsection (f)” for “subsection (g)” near the end; in present paragraph (e)(2), inserted “or leasing” near the beginning, inserted “, leasehold,” near the middle, substituted “July 1, 2008” for “July 1, 2006” and “subsection (f)” for “subsection (g)” near the end; redesignated former subsection (g) as present subsection (f); in present subsection (f),

designated the existing provisions as paragraphs (f)(1), (f)(2), (f)(4) and (f)(5); in present paragraph (f)(1), substituted “subsection (e)” for “subsection (f)” near the middle; added paragraph (f)(3); deleted former paragraph (h)(1), which read: “Any individual who knowingly violates subsection (d) of this Code section shall be guilty of a misdemeanor of a high and aggravated nature.”; redesignated former paragraph (h)(2) as present subsection (g), and deleted “any other any provision of” and “, except subsection (d) of this Code section,” preceding and following “this Code section,” respectively; and redesignated former subsection (i) as present subsection (h).

**Editor’s notes.** — This Code section formerly pertained to restriction on registered offenders residing, working, or loitering within certain distance of child care facilities, churches, schools, or areas where minors congregate; penalty for violations; civil causes of action. The former Code section was based on Ga. L. 2006, p. 379, § 24/HB 1059.

**Law reviews.** — For summary review article on zoning and land use law, see 60 Mercer L. Rev. 457 (2008). For survey article on criminal law, see 60 Mercer L. Rev. 85 (2008).

For comment, “‘An Era of Human Zoning’: Banning Sex Offenders from Communities Through Residence and Work Restrictions,” see 57 Emory L.J. 1347 (2008).

## JUDICIAL DECISIONS

**Editor’s notes.** — In light of the similarity of the subject matter, decisions under former Code 1981, § 42-1-13, enacted by Ga. L. 2003, p. 878, § 1 and former O.C.G.A. § 42-1-15, are included in the annotations for this Code section.

**Statute not unconstitutional ex post facto law.** — Even though former O.C.G.A. § 42-1-13 was passed after a sex offender’s statutory rape conviction, and used the prior conviction as an element of a future offense, it was not an ex post facto law since it only punished a future offense, which punishment was enhanced by the prior conviction, and the sex offender could only have been punished under former O.C.G.A. § 42-1-13 if the of-

fender prospectively chose to violate it by continuing to live at the offender’s current home; the fact that the prior conviction subjected the sex offender to possible punishment under former O.C.G.A. § 42-1-13 did not make the statute into an unconstitutional ex post facto law. *Denson v. State of Ga.*, 267 Ga. App. 528, 600 S.E.2d 645 (2004).

**Unconstitutional when applied to sex offender’s residence.** — In a declaratory action suit brought by a registered sex offender, former O.C.G.A. § 42-1-15(a) was held unconstitutional as to the sex offender’s residence, which was acquired prior to a child care facility locating itself within 1,000 feet of the property, as forc-

ing the sex offender from the home was a regulatory taking of the property without just and adequate compensation. However, no regulatory taking occurred with regard to prohibiting the sex offender from physically working at a business, pursuant to former § 42-1-15(b)(1), in which the sex offender held an ownership interest in as there existed no prohibition on owning a business within 1,000 feet of any child care facility, church, school, or other area where minors congregated and the sex offender failed to show that physically working at the premises was necessary. *Mann v. Ga. Dep't of Corr.*, 282 Ga. 754, 653 S.E.2d 740 (2007).

**Life sentence for failing to register unconstitutional.** — Imposition of a mandatory sentence of life imprisonment imposed against a defendant, who was a second time offender, for failing to register as a sexual offender was held unconstitutional as grossly disproportionate to the crime of failing to register. *Bradshaw v. State*, 284 Ga. 675, 671 S.E.2d 485 (2008).

**Cited** in *Stephens v. State*, 305 Ga. App. 339, 699 S.E.2d 558 (2010); *Taylor v. State*, 304 Ga. App. 878, 698 S.E.2d 384 (2010).

## RESEARCH REFERENCES

**ALR.** — Validity of statutes imposing residency restrictions on registered sex offenders, 25 ALR6th 227.

Validity, construction, and application of statutory and municipal enactments and conditions of release prohibiting sex offenders from parks, 40 ALR6th 419.

Validity, construction, and application of federal Sex Offender Registration and Notification Act (SORNA), 42 U.S.C.A. §§ 16901 et seq., its enforcement provision, 18 U.S.C.A. § 2250, and associated regulations, 30 ALR Fed. 2d 213.

## 42-1-16. Definitions; employment restrictions for sexual offenders; penalties.

(a) As used in this Code section, the term:

(1) “Area where minors congregate” shall include all public and private parks and recreation facilities, playgrounds, skating rinks, neighborhood centers, gymnasiums, school bus stops, and public and community swimming pools.

(2) “Individual” means a person who is required to register pursuant to Code Section 42-1-12.

(3) “Lease” means a right of occupancy pursuant to a written and valid lease or rental agreement.

(4) “Minor” means any person who is under 18 years of age.

(b) Any individual who committed an act between July 1, 2006, and June 30, 2008, for which such individual is required to register shall not reside within 1,000 feet of any child care facility, church, school, or area where minors congregate. Such distance shall be determined by measuring from the outer boundary of the property on which the individual resides to the outer boundary of the property of the child care facility, church, school, or area where minors congregate at their closest points.



(c)(1) Any individual who committed an act between July 1, 2006, and June 30, 2008, for which such individual is required to register shall not be employed by any child care facility, school, or church or by or at any business or entity that is located within 1,000 feet of a child care facility, a school, or a church. Such distance shall be determined by measuring from the outer boundary of the property of the location at which such individual is employed to the outer boundary of the child care facility, school, or church at their closest points.

(2) Any individual who committed an act between July 1, 2006, and June 30, 2008, for which such individual is required to register who is a sexually dangerous predator shall not be employed by any business or entity that is located within 1,000 feet of an area where minors congregate. Such distance shall be determined by measuring from the outer boundary of the property of the location at which the sexually dangerous predator is employed to the outer boundary of the area where minors congregate at their closest points.

(d) Notwithstanding any ordinance or resolution adopted pursuant to Code Section 16-6-24 or subsection (d) of Code Section 16-11-36, it shall be unlawful for any individual to loiter, as prohibited by Code Section 16-11-36, at any child care facility, school, or area where minors congregate.

(e)(1) If an individual owns or leases real property and resides on such property and a child care facility, church, school, or area where minors congregate thereafter locates itself within 1,000 feet of such property, or if an individual has established employment at a location and a child care facility, church, or school thereafter locates itself within 1,000 feet of such employment, or if a sexual predator has established employment and an area where minors congregate thereafter locates itself within 1,000 feet of such employment, such individual shall not be guilty of a violation of subsection (b) or (c) of this Code section, as applicable, if such individual successfully complies with subsection (f) of this Code section.

(2) An individual owning or leasing real property and residing on such property or being employed within 1,000 feet of a prohibited location, as specified in subsection (b) or (c) of this Code section, shall not be guilty of a violation of this Code section if such individual had established such property ownership, leasehold, or employment prior to July 1, 2006, and such individual successfully complies with subsection (f) of this Code section.

(f)(1) If an individual is notified that he or she is in violation of subsection (b) or (c) of this Code section, and if such individual claims that he or she is exempt from such prohibition pursuant to subsection

(e) of this Code section, such individual shall provide sufficient proof demonstrating his or her exemption to the sheriff of the county where the individual is registered within ten days of being notified of any such violation.

(2) For purposes of providing proof of residence, the individual may provide a driver's license, government issued identification, or any other documentation evidencing where the individual's habitation is fixed. For purposes of providing proof of property ownership, the individual shall provide a copy of his or her warranty deed, quitclaim deed, or voluntary deed, or other documentation evidencing property ownership.

(3) For purposes of providing proof of a leasehold, the individual shall provide a copy of the applicable lease agreement. Leasehold exemptions shall only be for the duration of the executed lease.

(4) For purposes of providing proof of employment, the individual may provide an Internal Revenue Service Form W-2, a pay check, or a notarized verification of employment from the individual's employer, or other documentation evidencing employment. Such employment documentation shall evidence the location in which such individual actually carries out or performs the functions of his or her job.

(5) Documentation provided pursuant to this subsection may be required to be date specific, depending upon the individual's exemption claim.

(g) Any individual who knowingly violates this Code section shall be guilty of a felony and shall be punished by imprisonment for not less than ten nor more than 30 years.

(h) Nothing in this Code section shall create, either directly or indirectly, any civil cause of action against or result in criminal prosecution of any person, firm, corporation, partnership, trust, or association other than an individual required to be registered under Code Section 42-1-12. (Code 1981, § 42-1-16, enacted by Ga. L. 2010, p. 168, § 14/HB 571.)

**Effective date.** — This Code section became effective May 20, 2010.

#### **42-1-17. Definitions; residency restrictions for sexual offenders; penalties.**

(a) As used in this Code section, the term:

(1) "Area where minors congregate" shall include all public and private parks and recreation facilities, playgrounds, skating rinks,

neighborhood centers, gymnasiums, and similar facilities providing programs or services directed towards persons under 18 years of age.

(2) “Child care facility” means all public and private pre-kindergarten facilities, child care learning centers, and preschool facilities.

(3) “Individual” means a person who is required to register pursuant to Code Section 42-1-12.

(4) “Lease” means a right of occupancy pursuant to a written and valid lease or rental agreement.

(5) “Minor” means any person who is under 18 years of age.

(b) Any individual who committed an act between June 4, 2003, and June 30, 2006, for which such individual is required to register shall not reside within 1,000 feet of any child care facility, school, or area where minors congregate. Such distance shall be determined by measuring from the outer boundary of the property on which the individual resides to the outer boundary of the property of the child care facility, school, or area where minors congregate at their closest points.

(c)(1) If an individual owns or leases real property and resides on such property and a child care facility, school, or area where minors congregate thereafter locates itself within 1,000 feet of such property, such individual shall not be guilty of a violation of subsection (b) of this Code section if such individual successfully complies with subsection (d) of this Code section.

(2) An individual owning or leasing real property and residing on such property within 1,000 feet of a prohibited location, as specified in subsection (b) of this Code section, shall not be guilty of a violation of this Code section if such individual had established such property ownership or leasehold prior to June 4, 2003, and such individual successfully complies with subsection (d) of this Code section.

(d)(1) If an individual is notified that he or she is in violation of subsection (b) of this Code section, and if such individual claims that he or she is exempt from such prohibition pursuant to subsection (c) of this Code section, such individual shall provide sufficient proof demonstrating his or her exemption to the sheriff of the county where the individual is registered within ten days of being notified of any such violation.

(2) For purposes of providing proof of residence, the individual may provide a driver’s license, government issued identification, or any other documentation evidencing where the individual’s habitation is fixed. For purposes of providing proof of property ownership, the individual shall provide a copy of his or her warranty deed,



quitclaim deed, or voluntary deed, or other documentation evidencing property ownership.

(3) For purposes of providing proof of a leasehold, the individual shall provide a copy of the applicable lease agreement. Leasehold exemptions shall only be for the duration of the executed lease.

(4) Documentation provided pursuant to this subsection may be required to be date specific, depending upon the individual’s exemption claim.

(e) Any individual who knowingly violates this Code section shall be guilty of a felony and shall be punished by imprisonment for not less than one nor more than three years.

(f) Nothing in this Code section shall create, either directly or indirectly, any civil cause of action against or result in criminal prosecution of any person, firm, corporation, partnership, trust, or association other than an individual required to be registered under Code Section 42-1-12. (Code 1981, § 42-1-17, enacted by Ga. L. 2010, p. 168, § 14/HB 571; Ga. L. 2013, p. 135, § 12/HB 354.)

**Effective date.** — This Code section became effective May 20, 2010. 1, 2013, substituted “child care learning centers” for “day-care centers” near the end of paragraph (a)(2).

**The 2013 amendment,** effective July

**42-1-18. “Photograph” defined; photographing minor without consent of parent or guardian prohibited; penalty.**

(a) As used in this Code section, the term “photograph” means to take any picture, film or digital photograph, motion picture film, videotape, or similar visual representation or image of a person.

(b) No person required to register as a sexual offender pursuant to Code Section 42-1-12 shall intentionally photograph a minor without the consent of the minor’s parent or guardian.

(c) Any person who knowingly violates this Code section shall be guilty of a misdemeanor of a high and aggravated nature. (Code 1981, § 42-1-18, enacted by Ga. L. 2010, p. 168, § 14/HB 571; Ga. L. 2011, p. 505, § 1/HB 162.)

**Effective date.** — This Code section became effective May 20, 2010. Code Section 42-1-12” for “individual” at the beginning subsection (b); and substituted “person” for “individual” at the beginning subsection (c).

**The 2011 amendment,** effective May 11, 2011, substituted “person required to register as a sexual offender pursuant to

### OPINIONS OF THE ATTORNEY GENERAL

**Fingerprinting required.** — Any misdemeanors for which those charged are to be fingerprinted. 2010 Op. Att'y Gen. No. 10-6.

#### 42-1-19. Petition for release from registration requirements.

(a) An individual required to register pursuant to Code Section 42-1-12 may petition a superior court for release from registration requirements and from any residency or employment restrictions of this article if the individual:

(1) Has completed all prison, parole, supervised release, and probation for the offense which required registration pursuant to Code Section 42-1-12; and

(A) Is confined to a hospice facility, skilled nursing home, residential care facility for the elderly, or nursing home;

(B) Is totally and permanently disabled as such term is defined in Code Section 49-4-80; or

(C) Is otherwise seriously physically incapacitated due to illness or injury;

(2) Was sentenced for a crime that became punishable as a misdemeanor on or after July 1, 2006, and meets the criteria set forth in subparagraphs (c)(1)(A) through (c)(1)(F) of Code Section 17-10-6.2;

(3) Is required to register solely because he or she was convicted of kidnapping or false imprisonment involving a minor and such offense did not involve a sexual offense against such minor or an attempt to commit a sexual offense against such minor. For purposes of this paragraph, the term "sexual offense" means any offense listed in division (a)(10)(B)(i) or (a)(10)(B)(iv) through (a)(10)(B)(xix) of Code Section 42-1-12; or

(4) Has completed all prison, parole, supervised release, and probation for the offense which required registration pursuant to Code Section 42-1-12 and meets the criteria set forth in subparagraphs (c)(1)(A) through (c)(1)(F) of Code Section 17-10-6.2.

(b)(1) A petition for release pursuant to this Code section shall be filed in the superior court of the jurisdiction in which the individual was convicted; provided, however, that if the individual was not convicted in this state, such petition shall be filed in the superior court of the county where the individual resides.

(2) Such petition shall be served on the district attorney of the jurisdiction where the petition is filed, the sheriff of the county where

the petition is filed, and the sheriff of the county where the individual resides. Service on the district attorney and sheriff may be had by mailing a copy of the petition with a proper certificate of service.

(3) If a petition for release is denied, another petition for release shall not be filed within a period of two years from the date of the final order on a previous petition.

(c)(1) An individual who meets the requirements of paragraph (1), (2), or (3) of subsection (a) of this Code section shall be considered for release from registration requirements and from residency or employment restrictions.

(2) An individual who meets the requirements of paragraph (4) of subsection (a) of this Code section may be considered for release from registration requirements and from residency or employment restrictions only if:

(A) Ten years have elapsed since the individual completed all prison, parole, supervised release, and probation for the offense which required registration pursuant to Code Section 42-1-12; or

(B) The individual has been classified by the board as a Level I risk assessment classification, provided that if the board has not done a risk assessment classification for such individual, the court shall order such classification to be completed prior to considering the petition for release.

(d) In considering a petition pursuant to this Code section, the court may consider:

- (1) Any evidence introduced by the petitioner;
- (2) Any evidence introduced by the district attorney or sheriff; and
- (3) Any other relevant evidence.

(e) The court shall hold a hearing on the petition if requested by the petitioner.

(f) The court may issue an order releasing the individual from registration requirements or residency or employment restrictions, in whole or part, if the court finds by a preponderance of the evidence that the individual does not pose a substantial risk of perpetrating any future dangerous sexual offense. The court may release an individual from such requirements or restrictions for a specific period of time. The court shall send a copy of any order releasing an individual from any requirements or restrictions to the sheriff and the district attorney of the jurisdiction where the petition is filed, to the sheriff of the county where the individual resides, to the Department of Corrections, and to the Georgia Bureau of Investigation. (Code 1981, § 42-1-19, enacted by Ga. L. 2010, p. 168, § 15/HB 571.)



**Effective date.** — This Code section became effective May 20, 2010.

### RESEARCH REFERENCES

**ALR.** — Validity, construction, and application of state sex offender registration statutes concerning level of classification

— Claims for downward departure, 66 ALR6th 1.

## CHAPTER 2

### BOARD AND DEPARTMENT OF CORRECTIONS

Sec.		Sec.	
42-2-1.	Creation.	42-2-11.	Powers and duties of board; adoption of rules and regulations.
42-2-3.	Board meetings.	42-2-14.	Power of Governor to declare state of emergency with regard to jail and prison overcrowding.
42-2-5.1.	Special school district for school age youth; education programs for adult offenders.	42-2-15.	Employee benefit fund.
42-2-6.	Office of commissioner created; general duties; appointment; compensation.	42-2-16.	Retaining department issued weapons.
42-2-8.	Additional duties of commissioner.		

#### 42-2-1. Creation.

There is created the Department of Corrections. (Ga. L. 1982, p. 3, § 42; Ga. L. 1985, p. 283, § 1; Ga. L. 2012, p. 899, § 7-3/HB 1176.)

**The 2012 amendment**, effective July 1, 2012, substituted the present provisions of this Code section for the former provisions, which read: “As used in this chapter, the term:

“(1) ‘Board’ means the Board of Corrections.

“(2) ‘Commissioner’ means the commissioner of corrections.

“(3) ‘Department’ means the Department of Corrections.” See editor’s note for applicability.

**Editor’s notes.** — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: “This Act shall become effective on July 1, 2012, and shall

apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act.”

**Law reviews.** — For article, “The Chevron Two-Step in Georgia’s Administrative Law,” see 46 Ga. L. Rev. 871 (2012). For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012).

## JUDICIAL DECISIONS

**Cited** in *Wolcott v. State*, 278 Ga. 664, 604 S.E.2d 478 (2004); *Gay v. Owens*, 292 Ga. 480, 738 S.E.2d 614 (2013).

**42-2-3. Board meetings.**

The board shall meet once each month in the office of the commissioner, unless in the discretion of a majority of the board it is necessary or convenient to meet elsewhere to carry out the duties of the board. Special meetings may be held at such times and places as shall be specified by the call of the chairman of the board or by the commissioner. The secretary of the board shall give written notice of the time and place of all meetings of the board to each member of the board and to the commissioner. Meetings of the board shall be open to the public. However, the board may hold executive sessions pursuant to Chapter 14 of Title 50 whenever it, in its discretion, deems advisable. A majority of the board shall constitute a quorum for the transaction of business. (Ga. L. 1956, p. 161, § 7; Ga. L. 1987, p. 457, § 1; Ga. L. 2002, p. 1426, § 1.)

**The 2002 amendment**, effective July 1, 2002, substituted “A majority” for “Eight members” at the beginning of the last sentence.

**42-2-5. Administrative functions of department.**

## JUDICIAL DECISIONS

**DOC was immune from suit for negligence of county employees in handling state prisoner.** — County that housed state inmates in the county’s prison under O.C.G.A. § 42-5-53 functioned as an independent contractor for which the state did not waive sovereign immunity under the Georgia Tort Claims Act, O.C.G.A. § 50-21-20, et seq.; there-

fore, the State Department of Corrections was entitled to be dismissed from the inmate’s suit based on sovereign immunity. *Ga. Dep’t of Corr. v. James*, 312 Ga. App. 190, 718 S.E.2d 55 (2011), cert. denied, No. S12C0381, 2012 Ga. LEXIS 539 (Ga. 2012).

**Cited** in *Gay v. Owens*, 292 Ga. 480, 738 S.E.2d 614 (2013).

**42-2-5.1. Special school district for school age youth; education programs for adult offenders.**

(a) In order to provide education for any school age youths incarcerated within any facility of the Department of Corrections, the department shall be considered a special school district which shall be given the same funding consideration for federal funds that school districts within the state are given. The special school district under the department shall have the powers, privileges, and authority exercised or capable of exercise by any other school district. The schools within

the special school district shall be under the control of the commissioner, who shall serve as the superintendent of schools for such district. The Board of Corrections shall serve as the board of education for such district. The board, acting alone or in cooperation with the State Board of Education, shall establish education standards for the district. As far as is practicable, such standards shall adhere to the standards adopted by the State Board of Education for the education of school age youth, while taking into account:

(1) The overriding security needs of correctional institutions and other restrictions inherent to the nature of correctional facilities;

(2) The effect of limited funding on the capability of the Department of Corrections to meet certain school standards; and

(3) Existing juvenile education standards of the Correctional Education Association and the American Correctional Association, which shall be given primary consideration where any conflicts arise.

(b) The effect of subsection (a) of this Code section shall not be to provide state funds to the special school district under the department through Part 4 of Article 6 of Chapter 2 of Title 20.

(c) The Board of Corrections, acting alone or in cooperation with the State Board of the Technical College System of Georgia or other relevant education agencies, shall provide overall direction of educational programs for adult offenders in the correctional system and shall exercise program approval authority. The board may enter into written agreements with other educational organizations and agencies in order to provide adult offenders with such education and employment skills most likely to encourage gainful employment and discourage return to criminal activity upon release. The board may also enter into agreements with other educational organizations and agencies to attain program certification for its vocational and technical education programs. (Code 1981, § 42-2-5.1, enacted by Ga. L. 1995, p. 357, § 1; Ga. L. 2011, p. 632, § 3/HB 49.)

**The 2011 amendment**, effective July 1, 2011, substituted “State Board of the Technical College System of Georgia” for “State Board of Technical and Adult Education” in the first sentence of subsection (c).

#### **42-2-6. Office of commissioner created; general duties; appointment; compensation.**

(a) There is created the position of commissioner of corrections. The commissioner shall be the chief administrative officer of the department. Subject to the general policy established by the board, the commissioner shall supervise, direct, account for, organize, plan, ad-



minister, and execute the functions vested in the department by this title.

(b) The commissioner shall be appointed by and shall serve at the pleasure of the board. Beginning July 1, 1999, the salary of the commissioner shall be set by the Governor and the expenses and allowances of the commissioner shall be as set by statute. (Ga. L. 1972, p. 1069, § 11; Ga. L. 1978, p. 1647, § 2; Ga. L. 1985, p. 283, § 1; Ga. L. 1999, p. 910, § 2; Ga. L. 1999, p. 1213, § 3.)

**The 1999 amendments.** — The first 1999 amendment, effective July 1, 1999, substituted the present second sentence of subsection (b) for the former second sentence, which read: "The salary, expenses, and allowances of the commissioner shall be as set by statute." The second 1999

amendment, effective July 1, 1999, substituted "Beginning July 1, 1999, the salary of the commissioner shall be set by the Governor and the expenses" for "The salary, expenses," in the second sentence of subsection (b).

#### 42-2-8. Additional duties of commissioner.

(a) The commissioner shall direct and supervise all the administrative activities of the board and shall attend all meetings of the board. The commissioner shall also make, publish in print or electronically, and furnish to the General Assembly and to the Governor annual reports regarding the work of the board, along with such special reports as he or she may consider helpful in the administration of the penal system or as may be directed by the board. The commissioner shall perform such other duties and functions as are necessary or desirable to carry out the intent of this chapter and which he or she may be directed to perform by the board.

(b) The commissioner or the commissioner's designee shall be authorized to make and execute contracts and all other instruments necessary or convenient for the acquisition of professional and personal employment services and for the leasing of real property. Subject to legislative appropriations, the commissioner shall also be authorized to make and execute any contract for the land acquisition, design, construction, operation, maintenance, use, lease, or management of a state correctional institution or for any services pertaining to the custody, care, and control of inmates or other functions as are related to the discharge of these responsibilities and to designate any person or organization with whom the commissioner contracts as a law enforcement unit under paragraph (7) of Code Section 35-8-2.

(c) The commissioner shall be authorized to issue a warrant for the arrest of an offender who has escaped from the custody of the department upon probable cause to believe the offender has violated Code Section 16-10-52, relating to escape from lawful confinement. (Ga. L. 1956, p. 161, § 9; Ga. L. 1958, p. 413, § 1; Ga. L. 1962, p. 689, § 1; Ga.

L. 1966, p. 121, § 1; Ga. L. 1988, p. 1448, § 1; Ga. L. 1996, p. 691, § 1; Ga. L. 2007, p. 224, § 1/HB 313; Ga. L. 2010, p. 838, § 10/SB 388.)

**The 2007 amendment**, effective May 18, 2007, designated the former provisions as present subsections (a) and (b) and added subsection (c).

**The 2010 amendment**, effective June 3, 2010, inserted “in print or electronically” in the second sentence of subsection (a).

#### **42-2-11. Powers and duties of board; adoption of rules and regulations.**

(a) The board shall establish the general policy to be followed by the department and shall have the duties, powers, authority, and jurisdiction provided for in this title or as otherwise provided by law.

(b) The board is authorized to adopt, establish, and promulgate rules and regulations governing the transaction of the business of the penal system of the state by the department and the commissioner and the administration of the affairs of the penal system in the different penal institutions coming under its authority and supervision and shall make the institutions as self-supporting as possible.

(c)(1) The board shall adopt rules governing the assignment, housing, working, feeding, clothing, treatment, discipline, rehabilitation, training, and hospitalization of all inmates coming under its custody.

(2)(A) As used in this paragraph, the term:

(i) “Evidence based practices” means supervision policies, procedures, programs, and practices that scientific research demonstrates reduce recidivism among individuals who are under some form of correctional supervision.

(ii) “Recidivism” means returning to prison or jail within three years of being placed on probation or being discharged or released from a department or jail facility.

(B) The board shall adopt rules and regulations governing the management and treatment of inmates and probationers to ensure that evidence based practices, including the use of a risk and needs assessment and any other method the board deems appropriate, guide decisions related to preparing inmates for release into the community and managing probationers in the community. The board shall require the department to collect and analyze data and performance outcomes relevant to the level and type of treatment given to an inmate or probationer and the outcome of the treatment on his or her recidivism and prepare an annual report regarding such information which shall be submitted to the Governor, the Lieutenant Governor, the Speaker of the House of Representatives,

and the chairpersons of the House Committee on State Properties and the Senate State Institutions and Property Committee.

(d) The board shall also adopt rules and regulations governing the conduct and the welfare of the employees of the state institutions operating under its authority and of the county correctional institutions and correctional facilities or programs operating under its supervision. It shall prescribe the working hours and conditions of work for employees in the office of the commissioner and in institutions operating under the authority of the board.

(e) The board shall also adopt rules and regulations governing the negotiation and execution of any contract for the land acquisition, design, construction, operation, maintenance, use, lease, or management of a state correctional institution or for any services pertaining to the custody, care, and control of inmates or other functions as are related to the discharge of these responsibilities.

(f) The board shall adopt rules:

(1) Providing for the transfer to a higher security facility of each inmate who commits battery or aggravated assault against a correctional officer while in custody; provided, however, that this provision shall not apply in instances where the inmate is already incarcerated in a maximum security facility; and

(2) Specifying the procedures for offering department assistance to employees who are victims of battery or aggravated assault by inmates in filing criminal charges or civil actions against their assailants, including procedures for posting notices that such assistance is available to any employee who is subjected to battery or aggravated assault by an inmate, but not including legal representation of such employees.

(g) All rules and regulations adopted pursuant to this Code section shall be adopted, established, promulgated, amended, repealed, filed, and published in accordance with the applicable provisions and procedure as set forth in Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." The courts shall take judicial notice of any such rules or regulations.

(h) As used in this Code section, the words "rules and regulations" shall have the same meaning as the word "rule" is defined in paragraph (6) of Code Section 50-13-2.

(i) The board shall have the authority to request bids and proposals and to enter into contracts for the operation of probation detention centers by private companies and entities for the confinement of probationers under Code Section 42-8-35.4 and probation diversion centers for the confinement of probationers under Code Section



42-8-35.5. The board shall have the authority to adopt, establish, and promulgate rules and regulations for the operation of probation detention and probation diversion centers by private companies and entities. (Ga. L. 1956, p. 161, § 11; Ga. L. 1969, p. 598, § 1; Ga. L. 1978, p. 1647, § 1; Ga. L. 1983, p. 3, §§ 31, 60; Ga. L. 1983, p. 507, § 3; Ga. L. 1996, p. 691, § 2; Ga. L. 1996, p. 726, § 1; Ga. L. 2006, p. 727, § 1/SB 44; Ga. L. 2012, p. 899, § 7-4/HB 1176; Ga. L. 2013, p. 141, § 42/HB 79.)

**The 2006 amendment**, effective May 3, 2006, added subsection (i).

**The 2012 amendment**, effective July 1, 2012, designated the existing provisions of subsection (c) as paragraph (c)(1) and added paragraph (c)(2). See editor's note for applicability.

**The 2013 amendment**, effective April 24, 2013, part of an Act to revise, modernize, and correct the Code, substituted "House Committee on State Properties" for "House Committee on State Institutions and Property" near the end of the last sentence of subparagraph (c)(2)(B).

**Editor's notes.** — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the Gen-

eral Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

**Law reviews.** — For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012).

## JUDICIAL DECISIONS

**Safety and health of inmates.** — The corrections department has a nondelegable duty to protect the safety and health of state inmates that cannot be relieved by employing independent contractors. *Williams v. Georgia Dep't of Cors.*, 224 Ga. App. 571, 481 S.E.2d 272 (1997).

**Rules on lethal injections not "treatment."** — Contrary to the inmate's claim, the Board of Corrections did not have a duty under the mandatory rulemaking provision of O.C.G.A. § 42-2-11(c)(1), regarding the "treatment" of inmates, to make rules governing lethal injections because "treatment" referred to medical care and lethal injections did not constitute the practice of medicine. *Hill v. Owens*, 292 Ga. 380, 738 S.E.2d 56 (2013).

**Supervision of prisoners discretionary function.** — The supervision of a prisoner work detail is a discretionary

function by virtue of which the supervisor is entitled to official immunity. *Parrish v. State*, 270 Ga. 878, 514 S.E.2d 834 (1999), reversing *Simmons v. Coweta County*, 229 Ga. App. 550, 494 S.E.2d 362 (1997).

**DOC was immune from suit for negligence of county employees in handling state prisoner.** — County that housed state inmates in the county's prison under O.C.G.A. § 42-5-53 functioned as an independent contractor for which the state did not waive sovereign immunity under the Georgia Tort Claims Act, O.C.G.A. § 50-21-20, et seq.; therefore, the State Department of Corrections was entitled to be dismissed from the inmate's suit based on sovereign immunity. *Ga. Dep't of Corr. v. James*, 312 Ga. App. 190, 718 S.E.2d 55 (2011), cert. denied, No. S12C0381, 2012 Ga. LEXIS 539 (Ga. 2012).

#### **42-2-14. Power of Governor to declare state of emergency with regard to jail and prison overcrowding.**

The Governor, upon certification by the commissioner of corrections and approval by the director of the Office of Planning and Budget that the population of the prison system of the State of Georgia has exceeded the capacity of the prison system for any period of 90 consecutive days, beginning at any time after December 31, 1988, may declare a state of emergency with regard to jail and prison overcrowding. Following the declaration of such emergency, the department may establish additional facilities for use by the department, such facilities to be either of a permanent type of construction or of a temporary or movable type as the department may find most advantageous to the particular needs, to the end that the inmates under its supervision may be so distributed throughout the state as to facilitate individualization of treatment designed to prepare them for lawful living in the community where they are most likely to reside after their release from a correctional facility. For this purpose, the department may purchase or lease sites and suitable lands and erect necessary buildings thereon or purchase or lease existing facilities, all within the limits of appropriations as approved by the General Assembly. With the approval of the Governor, provisions of Chapter 5 of Title 50, relating to the Department of Administrative Services, or provisions of Code Section 50-6-25 or Chapter 22 of Title 50, relating to control over acquisition of professional services, may be waived by the department to facilitate the rapid construction or procurement of facilities for inmates; provided, however, that the authority to waive provisions of Code Section 50-6-25 shall terminate as of July 1, 1991. During any year in which correctional facilities are constructed or procured under this Code section and any requirements are waived, the department shall furnish the Governor and the General Assembly with a detailed report specifying the facilities constructed or procured, the requirements waived, and the reasons therefor. (Code 1981, § 42-2-14, enacted by Ga. L. 1989, p. 57, § 1; Ga. L. 1990, p. 135, § 1; Ga. L. 2012, p. 775, § 42/HB 942.)

**The 2012 amendment**, effective May 1, 2012, part of an Act to revise, modernize, and correct the Code, deleted “provisions, other than bonding requirements,

of Chapter 3 of this title, known as the ‘Georgia Building Authority (Penal) Act,’” preceding “provisions of Chapter 5” in the fourth sentence of this Code section.

#### **42-2-15. Employee benefit fund.**

(a) As used in this Code section, the term:

(1) “Employee” means a full-time or part-time employee of the department or an employee serving under contract with the department.

(2) "Employee benefit fund" means an account containing the facility's profits generated from vending services maintained by a local facility.

(3) "Executive director of the facility" means the warden, superintendent, chief probation official, or such other head of a facility.

(4) "Facility" means a prison, institution, detention center, diversion center, probation office, or such other similar property under the jurisdiction or operation of the department.

(5) "Vending services" means one or more vending machines in a location easily accessible by employees, which services may also be accessible by members of the general public, but which vending machines do not require a manager or attendant for the purpose of purchasing food or drink items. Vending services shall be for the provision of snack or food items or nonalcoholic beverages and shall not include any tobacco products or alcoholic beverages.

(b) It is the intent of the General Assembly to provide an employee benefit as set forth in this Code section which benefit shall be of de minimis cost to the state and which shall in turn benefit the state through the retention of dedicated and experienced employees.

(c) Any other provision of the law notwithstanding, a facility is authorized to purchase vending machines or enter into vending service agreements by contract, sublease, or license for the purpose of providing vending services to each facility under the jurisdiction of the department. Vending services shall be provided in any facility where the operation of such vending services is capable of generating a profit for that facility. The facility's profits generated from the vending services shall be maintained by the local facility under the authority of the executive director of the facility in an interest-bearing account and the account shall be designated the "employee benefit fund."

(d) The fund shall be administered by a committee of five representatives of the facility to be selected by the executive director of the facility. Funds from the account may be spent as determined by a majority vote of the committee. Funds may be expended on an individual employee of the facility for the purpose of recognizing a death, birth, marriage, or prolonged illness or to provide assistance in the event of a natural disaster or devastation adversely affecting an employee or an employee's immediate family member. Funds may also be expended on an item or activity which shall benefit all employees of the facility equally for the purposes of developing camaraderie or otherwise fostering loyalty to the department or bringing together the employees of the facility for a meeting, training session, or similar gathering. Funds spent for an individual employee shall not exceed \$250.00 per person per event and funds expended for employee gatherings or items shall



not exceed \$1,000.00 per event or single item; provided, however, that events conducted for the benefit of employees of an entire institution shall not exceed \$4,500.00 per event.

(e) The employee benefit fund account of each facility shall be reviewed and audited by the administrative office of the local facility and by the department in accordance with standards and procedures established by the department. No account shall maintain funds in excess of \$5,000.00. Any funds collected which cause the fund balance to exceed \$5,000.00 shall be remitted to the department's general operating budget.

(f) Nothing in this Code section shall prohibit a facility from purchasing vending machines or providing or maintaining vending services which do not generate a profit, provided that such services are of no cost to the department, nor shall this Code section be construed so as to prohibit a private provider of vending services from making or retaining a profit pursuant to any agreement for such services. (Code 1981, § 42-2-15, enacted by Ga. L. 2006, p. 332, § 1/HB 1318.)

**Effective date.** — This Code section became effective July 1, 2006.

#### **42-2-16. Retaining department issued weapons.**

(a) An employee leaving the service of the department under honorable conditions who has accumulated 20 or more years of service with the department as a certified officer shall be entitled as part of such employee's compensation to retain his or her department issued weapon.

(b) The board is authorized to promulgate rules and regulations for the implementation of this Code section. (Code 1981, § 42-2-16, enacted by Ga. L. 2013, p. 82, § 1/HB 482.)

**Effective date.** — This Code section became effective July 1, 2013.

---

## **CHAPTER 3**

### **GEORGIA BUILDING AUTHORITY (PENAL)**

#### **42-3-1 through 42-3-32.**

Reserved. Repealed by Ga. L. 2008, p. 224, § 3, effective July 1, 2008.

**Editor’s notes.** — This chapter consisted of Code Sections 42-3-1 through 42-3-32, and was based on Ga. L. 1960, p. 892, §§ 2-30, 32; Ga. L. 1964, p. 91, §§ 1-3; Ga. L. 1965, p. 591, § 1; Ga. L. 1967, p. 810, § 1; Ga. L. 1967, p. 864, §§ 1-4; Ga. L. 1970, p. 552, § 1; Ga. L. 1972, p. 1015, § 419; Ga. L. 1982, p. 3, § 42; Ga. L. 1983, p. 3, § 60; Ga. L. 1985, p. 149, § 42; Ga. L. 1985, p. 283, § 1; Ga. L. 1988, p. 426, § 1; Ga. L. 1989, p. 415, § 1; Ga. L. 1991, p. 94, § 42.

CHAPTER 4

JAILS

Article 1

Sec.

General Provisions

cal care services to individuals in custody.

- Sec.

42-4-4. Duties of sheriff as to jail inmates; designation of inmate as trusty; failure to comply with Code section.

42-4-6. Confinement and care of tubercular inmates; crediting of time spent in hospital or institution against sentence.

42-4-7. Maintenance of inmate record by sheriff; earned time allowances.

42-4-13. Possession of drugs, weapons, or alcohol by inmates.

42-4-14. “Illegal alien” defined; determination of nationality of person charged with felony and confined in a jail facility.

42-4-15. Limitations on medical charges for providing emergency medi-
- Article 2

Conditions of Detention

42-4-32. Sanitation and health requirements generally; meals; inspections; medical treatment.

Article 4

Deductions from Inmate Accounts for Expenses

42-4-70. Definitions.

Article 5

Regional Jail Authorities

42-4-102. Construction of article; bonds not subject to regulation under Georgia Uniform Securities Act; power of counties and municipalities to activate authorities.

ARTICLE 1

GENERAL PROVISIONS

42-4-2. Oath and bond of jailers.

JUDICIAL DECISIONS

**Jailer did not obey oath.** — Motion for general demurrer by defendant, a county jailer, was properly denied on defendant’s indictment on a charge of violating defendant’s oath of office for receiving marijuana as payment for delivering a pack of cigarettes to an inmate because it could not be said that defendant had “well and truly” performed defendant’s duties. *Murkerson v. State*, 264 Ga. App. 701, 592 S.E.2d 184 (2003).

**42-4-4. Duties of sheriff as to jail inmates; designation of inmate as trusty; failure to comply with Code section.**

(a) It shall be the duty of the sheriff:

(1) To take from the outgoing sheriff custody of the jail and the bodies of such persons as are confined therein, along with the warrant or cause of commitment;

(2) To furnish persons confined in the jail with medical aid, heat, and blankets, to be reimbursed if necessary from the county treasury, for neglect of which he shall be liable to suffer the penalty prescribed in this Code section; provided, however, that, with respect to an inmate covered under Article 3 of this chapter, the officer in charge will provide such person access to medical aid and may arrange for the person's health insurance carrier to pay the health care provider for the aid rendered; and

(3) To take all persons arrested or in execution under any criminal or civil process to the jail of an adjoining county, or to the jail of some other county if the latter is more accessible, if the jail of his county is in an unsafe condition, under such rules as are prescribed in this chapter.

(b) Subject to the provisions of this subsection and except as provided by law or as directed by a court of competent jurisdiction, a sheriff shall not release a prisoner from his custody prior to the lawful completion of his sentence including any lawful credits under a trusty system. The provision shall not, however, preclude a sheriff from designating an inmate as a trusty and utilizing him in a lawful manner and, furthermore, this provision shall not preclude a sheriff from transferring a prisoner to another jail in another county if the sheriff concludes that such transfer is in the best interest of the prisoner or that such transfer is necessary for the orderly administration of the jail.

(c) Any sheriff or deputy who fails to comply with this Code section shall be fined for contempt, as is the clerk of the superior court in similar cases. The sheriff or deputy shall also be subject to removal from office as prescribed in Code Section 15-16-26. (Laws 1799, Cobb's 1851 Digest, p. 574; Laws 1810, Cobb's 1851 Digest, p. 577; Laws 1818, Cobb's 1851 Digest, p. 858; Laws 1820, Cobb's 1851 Digest, p. 480; Laws 1823, Cobb's 1851 Digest, p. 512; Code 1863, §§ 336, 340; Ga. L. 1865-66, p. 64, § 15; Code 1868, §§ 397, 401; Code 1873, §§ 361, 366; Code 1882, §§ 361, 366; Penal Code 1895, §§ 1127, 1128; Penal Code 1910, §§ 1156, 1157; Code 1933, §§ 77-110, 77-111; Ga. L. 1990, p. 1443, § 1; Ga. L. 1992, p. 2125, § 1; Ga. L. 2012, p. 173, § 2-10/HB 665.)



**The 2012 amendment**, effective July 1, 2012, substituted “Code Section 15-16-26” for “Code Section 15-6-82” at the

end of the second sentence of subsection (c).

## JUDICIAL DECISIONS

### **Duty of care sheriff owes prisoners.**

This section and § 42-5-2 create an obligation merely to provide inmates with access to medical care and the county met that obligation by contracting with a local medical services provider to provide medical care to the detention center. *Epps v. Gwinnett County*, 231 Ga. App. 664, 499 S.E.2d 657 (1998).

When officers arrested a decedent who died shortly after the arrest, the officers and a city could not be held liable for violating O.C.G.A. § 42-4-4 or O.C.G.A. § 42-5-2 by denying the decedent medical care because: (1) O.C.G.A. § 42-4-4 imposed a duty only upon sheriffs and deputies; (2) O.C.G.A. § 42-5-2 imposed a duty only on a governmental unit having physical custody of a detainee; and (3) the decedent was taken into custody by a county police officer and transported to a county jail, so the decedent was never in the custody of the city, and suit could not be brought against the city under O.C.G.A. § 42-5-2. *Hoyt v. Bacon County*, No. 509-026, 2011 U.S. Dist. LEXIS 7330 (S.D. Ga. Jan. 26, 2011).

**Sheriff’s power to make purchases from third parties.** — County sheriff had the authority to repaint and remark county-owned sheriff’s vehicles assigned to the sheriff’s exclusive use, but lacked the authority to modify portions of a county-owned building in which the sheriff’s office and jail were housed, as the facility was shared with the superior, state, and magistrate courts of Clayton

County, as well as the clerks of those courts, the solicitor general, and the district attorney, and hence, not under the sheriff’s exclusive use. Summary judgment in favor of the county was reversed as to the former, but affirmed as to the latter. *Hill v. Clayton County Bd. of Comm’rs*, 283 Ga. App. 15, 640 S.E.2d 638 (2006).

**Sovereign immunity.** — Providing adequate medical attention for inmates under defendant’s custody and control is a ministerial act by the sheriff and his or her deputies and does not involve the exercise of discretion to provide medical care; thus, such act is not subject to either sovereign immunity or official immunity. *Cantrell v. Thurman*, 231 Ga. App. 510, 499 S.E.2d 416 (1998).

**Violation of duty.** — Court granted summary judgment to the United States in a suit alleging that conditions at a county jail violated the inmates’ federal due process rights. A sheriff and the members of a county board of commissioners did not dispute that the conditions, including the denial of medical care in violation of O.C.G.A. § 42-4-4, were unconstitutional, and the evidence showed that they had subjective knowledge of the conditions, including copies of the United States’ investigation reports, and acted with indifference that exceeded negligence. *United States v. Terrell County*, 457 F. Supp. 2d 1359 (M.D. Ga. 2006).

**Cited in** *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003); *Murphy v. Bajjani*, 282 Ga. 197, 647 S.E.2d 54 (2007).

## 42-4-5. Cruelty to inmates.

## JUDICIAL DECISIONS

**Rape allegation failed.** — Arrestee’s state law claims in her 42 U.S.C. § 1983 suit against a county sheriff, alleging that she was raped by a deputy at the county jail, failed as a matter of law because O.C.G.A. § 42-4-5 did not provide for a

civil remedy. *Boyd v. Nichols*, 616 F. Supp. 2d 1331 (M.D. Ga. 2009).

**Evidence sufficient to support conviction.** — See *Waddell v. State*, 224 Ga. App. 172, 480 S.E.2d 224 (1996).

**Cited in** *Ga. Dep’t of Corrs. v. Barkwell*,

256 Ga. App. 877, 570 S.E.2d 13 (2002);  
Manders v. Lee, 338 F.3d 1304 (11th Cir.  
2003).

### RESEARCH REFERENCES

**ALR.** — Duress, necessity, or conditions of confinement as justification for escape from prison, 54 ALR5th 141.

Constitutional right of prisoners to abortion services and facilities, 28 ALR6th 485.

#### **42-4-6. Confinement and care of tubercular inmates; crediting of time spent in hospital or institution against sentence.**

(a) When any person confined in the common jail who is awaiting trial for any offense against the penal laws of this state or who has been convicted of an offense or who is serving any jail sentence imposed upon him by authority or who has been committed for any civil or criminal contempt or who is serving any misdemeanor sentence under county jurisdiction in a county correctional institution or other institution for the maintenance of county inmates is afflicted with tuberculosis, the judge of the superior court may order the person's delivery by the sheriff to an institution as may be approved and supported by the Department of Public Health for the care of tubercular patients; thereupon, he shall be so delivered and received in such institution and shall be securely confined, kept, and cared for.

(b) The period of time a person is kept and confined in a hospital or institution pursuant to subsection (a) of this Code section shall be credited upon any jail sentence being served by him, in the same manner as though he had remained in jail. Any person committed for any civil or criminal contempt shall remain for all purposes under the orders, jurisdiction, and authority of the court committing him for contempt while in the hospital or institution, in the same manner as though he had remained in the common jail. (Ga. L. 1960, p. 769, § 2; Ga. L. 1964, p. 365, § 1; Ga. L. 1994, p. 97, § 42; Ga. L. 2009, p. 453, § 1-4/HB 228; Ga. L. 2011, p. 705, § 6-3/HB 214.)

**The 2009 amendment**, effective July 1, 2009, substituted "Department of Community Health" for "Department of Human Resources" near the end of subsection (a).

**The 2011 amendment**, effective July

1, 2011, substituted "Department of Public Health" for "Department of Community Health" near the end of subsection (a).

**Law reviews.** — For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 147 (2011).

#### **42-4-7. Maintenance of inmate record by sheriff; earned time allowances.**

(a) The sheriff shall keep a record of all persons committed to the jail of the county of which he or she is sheriff. This record shall contain the

name of the person committed, such person's age, sex, race, under what process such person was committed and from what court the process issued, the crime with which the person was charged, the date of such person's commitment to jail, the day of such person's discharge, under what order such person was discharged, and the court from which the order issued. This record shall be subject to examination by any person in accordance with the provisions of Article 4 of Chapter 18 of Title 50, relating to the inspection of public records.

(b)(1) The sheriff, chief jailer, warden, or other officer designated by the county as custodian of inmates confined as county inmates for probation violations of felony offenses or as provided in subsection (a) of Code Section 17-10-3 may award earned time allowances to such inmates based on institutional behavior. Earned time allowances shall not be awarded which exceed one-half of the period of confinement imposed, except that the sheriff or other custodian may authorize the award of not more than four days' credit for each day on which an inmate does work on an authorized work detail; provided, however, that such increased credit for performance on a work detail shall not apply to an inmate who is incarcerated for:

(A) A second or subsequent offense of driving under the influence under Code Section 40-6-391 within a five-year period of time, as measured from the date of any previous arrest for which a conviction was obtained or a plea of nolo contendere was accepted to the date of the current arrest for which a conviction is obtained or a plea of nolo contendere is accepted;

(B) A misdemeanor of a high and aggravated nature; or

(C) A crime committed against a family member as defined in Code Section 19-13-1.

(2) While an inmate sentenced to confinement as a county inmate is in custody as a county inmate, the custodian of such inmate may award an earned time allowance consistent with this subsection and subsection (b) of Code Section 17-10-4 based on the institutional behavior of such inmate while in custody as a county inmate.

(3) An inmate sentenced to confinement as a county inmate shall be released at the expiration of his or her sentence less the time deducted for earned time allowances.

(c) Commencing January 1, 1984, those provisions of subsection (b) of this Code section which provide for good-time allowances to be awarded to inmates sentenced to confinement as county inmates as provided in subsection (a) of Code Section 17-10-3 shall apply to all such inmates in confinement on December 31, 1983, and all inmates who commit crimes on or after January 1, 1984, and are subsequently



convicted and sentenced to confinement as county inmates. Conversion of the computation of the sentences of county inmates in confinement on December 31, 1983, from earned time governed sentences to good-time governed sentences shall be made by the sheriff or other custodian of such inmates. Commencing July 1, 1994, those provisions of subsection (b) of this Code section which provide for good-time allowances to be awarded to inmates sentenced to confinement as county inmates for probation violations of felony offenses shall apply to all such inmates in confinement on June 30, 1994, and all inmates whose probation is revoked or who commit crimes on or after July 1, 1994, and are subsequently sentenced to confinement as county inmates. Commencing July 1, 2000, the award of earned time allowances pursuant to subsection (b) of this Code section for persons who commit crimes on or after July 1, 2000, and are subsequently convicted and sentenced to confinement as county inmates and inmates whose probation is revoked on or after July 1, 2000, or who commit crimes on or after July 1, 2000, and are subsequently sentenced to confinement as county inmates is not automatic or mandatory but shall be based upon institutional behavior. (Ga. L. 1877, p. 111, § 1; Code 1882, § 366a; Penal Code 1895, § 1125; Penal Code 1910, § 1154; Code 1933, § 77-108; Ga. L. 1983, p. 1340, § 1; Ga. L. 1993, p. 632, § 1; Ga. L. 1994, p. 1955, § 1; Ga. L. 2000, p. 1111, § 2; Ga. L. 2004, p. 155, § 1.)

**The 2000 amendment**, effective July 1, 2000, in subsection (b), in paragraph (1), substituted “may award earned time” for “shall award good-time” in the first sentence and substituted “Earned time” for “Good-time” in the second sentence, rewrote paragraph (2), and substituted “earned time” for “good-time” in paragraph (3); in subsection (c), substituted “earned time” for “earned-time” in the second sentence, and added the last sentence.

**The 2004 amendment**, effective July 1, 2004, in paragraph (b)(1), added “, except that the sheriff or other custodian may authorize the award of not more than four days’ credit for each day on which an inmate does work on an authorized work

detail; provided, however, that such increased credit for performance on a work detail shall not apply to an inmate who is incarcerated for:” at the end of the first sentence and added the subparagraphs.

**Editor’s notes.** — Ga. L. 2000, p. 1111, § 3, not codified by the General Assembly, provides that: “This Act shall become effective on July 1, 2000, and shall apply to persons who commit crimes on or after such date and who are subsequently convicted and sentenced to confinement as county inmates and to persons whose probation is revoked on or after such date or who commit crimes on or after such date and who subsequently are sentenced to confinement as county inmates.”

## JUDICIAL DECISIONS

**Imposition of probation** on any time by which confinement is shortened due to good-time credit is prohibited by the provision of paragraph (b)(3). *Hutchins v.*

*State*, 243 Ga. App. 261, 533 S.E.2d 107 (2000).

**Cited in** *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003).

**42-4-11. Procedure for transfer of person in custody upon change of venue.**

**JUDICIAL DECISIONS**

**Cited in** Manders v. Lee, 338 F.3d 1304  
(11th Cir. 2003).

**42-4-12. Penalty for refusal by officer to receive persons charged with or guilty of offense.**

**JUDICIAL DECISIONS**

**Cited in** Manders v. Lee, 338 F.3d 1304  
(11th Cir. 2003).

**42-4-13. Possession of drugs, weapons, or alcohol by inmates.**

(a) As used in this Code section, the term:

(1) “Alcoholic beverage” means and includes all alcohol, distilled spirits, beer, malt beverage, wine, or fortified wine.

(2) “Controlled substance” means a drug, substance, or immediate precursor as defined in Code Section 16-13-21.

(3) “Dangerous drug” has the same meaning as defined by Code Section 16-13-71.

(4) “Jail” means any county jail, municipal jail, or any jail or detention facility operated by a county, municipality, or a regional jail authority as authorized under Article 5 of this chapter.

(5) “Jailer” means the sheriff in the case of any county jail, or the chief of police if the jail is under the supervision of the chief of police of a municipality, or the warden, captain, administrator, superintendent, or other officer having supervision of any other jail, or the designee of such officer.

(b)(1) It shall be unlawful for an inmate of a jail to possess any controlled substance, dangerous drug, gun, pistol, or other dangerous weapon or marijuana.

(2) Any person who violates paragraph (1) of this subsection shall be guilty of a felony and, upon conviction thereof, shall be imprisoned for not less than one nor more than five years.

(3) Notwithstanding the provisions of this subsection, possession of a controlled substance, a dangerous drug, or marijuana shall be punished as provided in Chapter 13 of Title 16; provided, however, that the provisions of Code Section 16-13-2 shall not apply to a violation of paragraph (1) of this subsection.

(4) The provisions of this subsection shall not prohibit the lawful use or dispensing of a controlled substance or dangerous drug to an inmate with the knowledge and consent of the jailer when such use or dispensing is lawful under the provisions of Chapter 13 of Title 16.

(c)(1) Unless otherwise authorized by law, it shall be unlawful for an inmate of a jail to possess any alcoholic beverage.

(2) Any person who violates paragraph (1) of this subsection shall be guilty of a misdemeanor.

(d)(1)(A) It shall be unlawful for any person to come inside the guard lines established at any jail with, or to give or have delivered to an inmate of a jail, any controlled substance, dangerous drug, marijuana, or any gun, pistol, or other dangerous weapon without the knowledge and consent of the jailer or a law enforcement officer.

(B) It shall be unlawful for any person to come inside the guard lines established at any jail with, or to give or have delivered to an inmate of a jail, any alcoholic beverage without the knowledge and consent of the jailer or a law enforcement officer; provided, however, that the provisions of this subsection shall not apply to nor prohibit the use of an alcoholic beverage by a clergyman or priest in sacramental services only.

(2) Except as otherwise provided in paragraph (3) of this subsection, any person who violates subparagraph (A) of paragraph (1) of this subsection shall be guilty of a felony and, upon conviction thereof, shall be imprisoned for not less than one nor more than five years. Any person who violates subparagraph (B) of paragraph (1) of this subsection shall be guilty of a misdemeanor.

(3) Notwithstanding the provisions of paragraph (2) of this subsection, the possession, possession with intent to distribute, trafficking, or distribution of a controlled substance or marijuana shall be punished as provided in Chapter 13 of Title 16; provided, however, that the provisions of Code Section 16-13-2 shall not apply to a violation of subparagraph (A) of paragraph (1) of this subsection.

(e) It shall be unlawful for any person to obtain, to procure for, or to give to an inmate, or to bring within the guard lines, any other article or item without the knowledge and consent of the jailer or a law enforcement officer. Any person violating this subsection shall be guilty of a misdemeanor.

(f)(1) It shall be unlawful for any person to come inside the guard lines or be within any jail while under the influence of a controlled substance, dangerous drug, or marijuana without the knowledge and consent of the jailer or a law enforcement officer unless such person has a valid prescription for such controlled substance or dangerous



drug issued by a person licensed under Chapter 11 or 34 of Title 43 and such prescribed substance is consumed only as authorized by the prescription. Any person convicted of a violation of this subsection shall be punished by imprisonment for not less than one nor more than four years.

(2) It shall be unlawful for any person to come inside the guard lines or be within any jail while under the influence of alcohol without the knowledge and consent of the jailer or a law enforcement officer. Any person violating this subsection shall be guilty of a misdemeanor.

(g) It shall be unlawful for any person to loiter where inmates are assigned after having been ordered by the jailer or a law enforcement officer to desist therefrom. Any person violating this subsection shall be guilty of a misdemeanor.

(h) It shall be unlawful for any person to attempt, conspire, or solicit another to commit any offense defined by this Code section and, upon conviction thereof, shall be punished by imprisonment not exceeding the maximum punishment prescribed for the offense, the commission of which was the object of the attempt, conspiracy, or solicitation.

(i) Any violation of this Code section shall constitute a separate offense.

(j) Perimeter guard lines shall be established at every jail by the jailer thereof. Such guard lines shall be clearly marked by signs on which shall be plainly stamped or written: "Guard line of \_\_\_\_\_. " Signs shall also be placed at all entrances and exits for vehicles and pedestrians at the jail and at such intervals along the guard lines as will reasonably place all persons approaching the guard lines on notice of the location of the jail. (Code 1981, § 42-4-13, enacted by Ga. L. 1987, p. 611, § 1; Ga. L. 1993, p. 630, § 1; Ga. L. 1999, p. 648, § 1; Ga. L. 2000, p. 136, § 42.)

**The 1999 amendment**, effective July 1, 1999, in subsection (a), substituted "as defined in Code Section 16-13-21" for "in Schedules III through V of Code Section 16-13-27 through 16-13-29" in paragraph (2), and added paragraphs (4) and (5); in subsection (b), substituted "It" for "Unless otherwise authorized by law, it" and substituted "marijuana" for "any marijuana in a quantity of one ounce or less" in paragraph (1), substituted "a controlled substance, a dangerous drug, or marijuana" for "marijuana in a quantity greater than one ounce" and added the proviso in paragraph (3), and added paragraph (4); in subsection (d), designated the existing provisions of paragraph (1) as

subparagraph (d)(1)(A) and in that subparagraph deleted "alcoholic beverage," following "any", substituted "marijuana," for "or any marijuana in a quantity of one ounce or less," substituted "jailer or a law enforcement officer." for "sheriff or the sheriff's designated representative or a detention facility administrator or his or her designee; provided, however, that the provisions of this subsection shall not apply to nor prohibit the use of an alcoholic beverage by a clergyman or priest in sacramental services only.", added subparagraph (d)(1)(B), in paragraph (2), substituted "subparagraph (1)(A)" for "paragraph (1)" and added the last sentence, and, in paragraph (3), inserted "

possession with intent to distribute, trafficking,” deleted “in a quantity greater than one ounce” preceding “shall be”, and added the proviso; and added subsections (e) through (j).

**The 2000 amendment**, effective March 16, 2000, part of an Act to revise, modernize, and correct the Code, substituted “paragraph (1)” for “subparagraph

(1)(A)” in paragraph (3) of subsection (b); in subsection (d), in paragraph (2), substituted “subparagraph (A) of paragraph (1)” for “subparagraph (1)(A)” and substituted “subparagraph (B) of paragraph (1)” for “subparagraph (1)(B)”, and substituted “subparagraph (A) of paragraph (1)” for “subparagraph (1)(A)” in paragraph (3).

## JUDICIAL DECISIONS

**Definition of dangerous weapon.** — The words “dangerous weapon” are not words of art but words of common understanding and meaning which require no

definition for understanding by the jury. *Stone v. State*, 236 Ga. App. 365, 511 S.E.2d 915 (1999).

## OPINIONS OF THE ATTORNEY GENERAL

### **Fingerprintable offenses, etc.**

If the person is not already incarcerated, violations of subsections (e) and (h) and subparagraph (d)(1)(B) are designated as offenses for which those charged are to be fingerprinted. 1999 Op. Att’y Gen. No. 99-17.

Violation of paragraph (f)(2) is not des-

ignated as an offense for which fingerprinting is required. 1999 Op. Att’y Gen. No. 99-17.

Violation of subsection (g) is designated as an offense for which those charged are to be fingerprinted. 1999 Op. Att’y Gen. No. 99-17.

## **42-4-14. “Illegal alien” defined; determination of nationality of person charged with felony and confined in a jail facility.**

(a) As used in this Code section, the term “illegal alien” means a person who is verified by the federal government to be present in the United States in violation of federal immigration law.

(b) When any person is confined, for any period, in the jail of a county or municipality or a jail operated by a regional jail authority in compliance with Article 36 of the Vienna Convention on Consular Relations, a reasonable effort shall be made to determine the nationality of the person so confined.

(c) When any foreign national is confined, for any period, in a county or municipal jail, a reasonable effort shall be made to verify that such foreign national has been lawfully admitted to the United States and if lawfully admitted, that such lawful status has not expired. If verification of lawful status cannot be made from documents in the possession of the foreign national, verification shall be made within 48 hours through a query to the Law Enforcement Support Center (LESC) of the United States Department of Homeland Security or other office or agency designated by the federal government. If the foreign national is

determined to be an illegal alien, the keeper of the jail or other officer shall notify the United States Department of Homeland Security, or other office or agency designated for notification by the federal government.

(d) Nothing in this Code section shall be construed to deny a person bond or from being released from confinement when such person is otherwise eligible for release; provided, however, that upon verification that any person confined in a jail is an illegal alien, such person may be detained, arrested, and transported as authorized by state and federal law.

(e) The Georgia Sheriffs Association shall prepare and issue guidelines and procedures used to comply with the provisions of this Code section. (Code 1981, § 42-4-14, enacted by Ga. L. 2006, p. 105, § 5/SB 529; Ga. L. 2008, p. 1137, § 4/SB 350; Ga. L. 2009, p. 8, § 42/SB 46; Ga. L. 2009, p. 970, § 2/HB 2; Ga. L. 2011, p. 794, § 13/HB 87.)

**Effective date.** — This Code section became effective July 1, 2007.

**The 2008 amendment,** effective July 1, 2008, inserted “or convicted of driving without being licensed in violation of subsection (a) of Code Section 40-5-20” near the middle of subsection (a).

**The 2009 amendments.** — The first 2009 amendment, effective April 14, 2009, part of an Act to revise, modernize, and correct the Code, revised language and punctuation in subsection (a). The second 2009 amendment, effective January 1, 2010, in subsection (a), deleted “charged with a felony or with driving under the influence pursuant to Code Section 40-6-391 or convicted of driving without being licensed in violation of subsection (a) of Code Section 40-5-20” following “person” at the beginning, substituted “a county or municipality” for “the county, any municipality”, and inserted “in compliance with Article 36 of the Vienna Convention on Consular Relations”; and, in the first sentence of subsection (b), inserted “charged with a felony, driving under the influence pursuant to Code Section 40-6-391, driving without being licensed pursuant to subsection (a) of Code Section 40-5-20, or with a misdemeanor of a high and aggravated nature”. See the Code Commission note regarding the effect of these amendments.

**The 2011 amendment,** effective July 1, 2011, added subsection (a); redesignated

former subsections (a) through (d) as present subsections (b) through (e), respectively; rewrote subsection (c); and added the proviso in subsection (d). See editor’s note for applicability.

**Code Commission notes.** — The amendment of this Code section by Ga. L. 2009, p. 8, § 42, irreconcilably conflicted with and was treated as superseded by Ga. L. 2009, p. 970, § 2, effective January 1, 2010. See *County of Butts v. Strahan*, 151 Ga. 417 (1921).

**Editor’s notes.** — Ga. L. 2006, p. 105, § 1, not codified by the General Assembly, provides: “This Act shall be known and may be cited as the ‘Georgia Security and Immigration Compliance Act.’ All requirements of this Act concerning immigration or the classification of immigration status shall be construed in conformity with federal immigration law.”

Ga. L. 2011, p. 794, § 1, not codified by the General Assembly, provides that: “This Act shall be known and may be cited as the ‘Illegal Immigration Reform and Enforcement Act of 2011.’”

Ga. L. 2011, p. 794, § 21, not codified by the General Assembly, provides that: “(a) If any provision or part of any provision of this Act or the application of the same is held invalid or unconstitutional, the invalidity shall not affect the other provisions or applications of this Act or any other part of this Act than can be given effect without the invalid provision or applica-



tion, and to this end, the provisions of this Act are severable.

“(b) The terms of this Act regarding immigration shall be construed to have the meanings consistent with such terms under federal immigration law.

“(c) The provisions of this Act shall be implemented in a manner consistent with federal laws governing immigration and civil rights.”

Ga. L. 2011, p. 794, § 22, not codified by the General Assembly, provides, in part,

that the amendment of this Code section by that Act shall apply to offenses and violations occurring on or after July 1, 2011.

**Law reviews.** — For article on 2006 enactment of this Code section, see 23 Ga. St. U.L. Rev. 247 (2006). For article, “The Georgia Security and Immigration Compliance Act: Comprehensive Immigration Reform in Georgia — ‘Think Globally ... Act Locally,’” see 13 Ga. St. B. J. 14 (2007).

#### **42-4-15. Limitations on medical charges for providing emergency medical care services to individuals in custody.**

(a) As used in this Code section, the term:

(1) “Detainee” means a person held in a detention facility who is charged with or convicted of a criminal offense or charged with or adjudicated for a delinquent act and a person detained, arrested, or otherwise held in lawful custody for a criminal offense or delinquent act.

(2) “Detention facility” means any municipal or county jail or other facility used for the detention of persons charged with or convicted of a criminal offense or charged with or adjudicated for a delinquent act.

(3) “Emergency health care” means bona fide emergency services provided after the onset of a medical or traumatic condition manifesting itself by acute symptoms of sufficient severity such that the absence of immediate medical attention could reasonably be expected to result in placing the person’s health in serious jeopardy, serious impairment to bodily functions, or serious dysfunction of any bodily organ or part. The term covers any form of emergency medical treatment, including dental, optical, psychological, or other types of emergency conditions.

(4) “Follow-up health care” means medical and hospital care and medication administered in conjunction with and arising from emergency health care treatment.

(b) A hospital or other health care facility licensed or established pursuant to Chapter 7 of Title 31 which is not a party to an emergency health care services contract with a sheriff or a governing authority or its agent on July 1, 2011, shall be reimbursed no more than the applicable Georgia Medicaid rate for emergency health care and follow-up health care services provided to a detainee.

(c) No hospital or other health care facility shall discharge a detainee with an emergency health care condition so as to require an immediate

transfer to another medical provider for the same condition unless the reasonable standard of care requires such a transfer.

(d) Nothing in this Code section shall be construed to limit reimbursements for emergency health care services when insurance coverage is available for payment for such services. Nor shall this Code section be construed so as to limit or remove responsibility for payment of emergency health care services by a provider of insurance that is otherwise responsible for payment of part or all of such services.

(e) Nothing in this Code section shall prohibit the governing authority from negotiating higher fees or rates with hospitals. (Code 1981, § 42-4-15, enacted by Ga. L. 2011, p. 440, § 1/HB 197.)

**Effective date.** — This Code section became effective May 11, 2011.

## ARTICLE 2

### CONDITIONS OF DETENTION

#### RESEARCH REFERENCES

**Am. Jur. Trials.** — Prisoners' Rights Asserting Claims of Unconstitutional Litigation, 22 Am. Jur. Trials 1. Prison Conditions, 64 Am. Jur. Trials 425.

#### **42-4-31. Required safety and security measures.**

#### JUDICIAL DECISIONS

**Cited in** Manders v. Lee, 338 F.3d 1304 (11th Cir. 2003).

#### **42-4-32. Sanitation and health requirements generally; meals; inspections; medical treatment.**

(a) All aspects of food preparation and food service shall conform to the applicable standards of the Department of Public Health.

(b) All inmates shall be given not less than two substantial and wholesome meals daily.

(c) Sanitation inspections of both facilities and inmates shall be made as frequently as is necessary to ensure against the presence of unsanitary conditions. An official from the Department of Public Health or an officer designated by the commissioner of public health shall inspect the facilities at least once every three months. New inmates should be carefully classified, with adequate separation and treatment given as needed.

(d) The officer in charge or his designated representative shall assure that each inmate is observed daily, and a physician shall be immediately called if there are indications of serious injury, wound, or illness. The instructions of the physician shall be strictly carried out. Ill inmates shall be furnished such food as is prescribed by the attending physician. (Ga. L. 1973, p. 890, § 3; Ga. L. 1977, p. 761, § 1; Ga. L. 1990, p. 135, § 2; Ga. L. 2009, p. 453, §§ 1-4, 1-6/HB 228; Ga. L. 2011, p. 705, §§ 6-3, 6-5/HB 214.)

**The 2009 amendment**, effective July 1, 2009, substituted “Department of Community Health” for “Department of Human Resources” in subsection (a), and in the second sentence of subsection (c); and substituted “commissioner of community health” for “commissioner of human resources” in the second sentence of subsection (c).

**The 2011 amendment**, effective July 1, 2011, substituted “Department of Pub-

lic Health” for “Department of Community Health” in subsection (a), and, in the second sentence of subsection (c), substituted “Department of Public Health” for “Department of Community Health” and substituted “commissioner of public health” for “commissioner of community health”.

**Law reviews.** — For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 147 (2011).

## JUDICIAL DECISIONS

**Violation of duties.** — Court granted summary judgment to the United States in a suit alleging that conditions at a county jail violated the inmates’ federal due process rights. A sheriff and the members of a county board of commissioners did not dispute that the conditions, including the presence of vermin and sewerage problems, in violation of O.C.G.A. § 42-4-32, were unconstitutional, and the

evidence showed that they had subjective knowledge of the conditions, including copies of the United States’ investigation reports, and acted with indifference that exceeded negligence. *United States v. Terrell County*, 457 F. Supp. 2d 1359 (M.D. Ga. 2006).

**Cited in** *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003).

## ARTICLE 3

### MEDICAL SERVICES FOR INMATES

#### 42-4-50. Definitions.

## RESEARCH REFERENCES

**ALR.** — Prisoner’s right to die or refuse medical treatment, 66 ALR5th 111.



**42-4-51. Information as to inmate's health insurance or eligibility for benefits; access to medical services; liability for payment; inmate's liability for costs of medical care; procedure for recovery against inmate.**

### JUDICIAL DECISIONS

**Violation of duties.** — Court granted summary judgment to the United States in a suit alleging that conditions at a county jail violated the inmates' federal due process rights. A sheriff and the members of a county board of commissioners did not dispute that the conditions, including the denial of medical care, in

violation of O.C.G.A. § 42-4-51, were unconstitutional, and the evidence showed that they had subjective knowledge of the conditions, including copies of the United States' investigation reports, and acted with indifference that exceeded negligence. *United States v. Terrell County*, 457 F. Supp. 2d 1359 (M.D. Ga. 2006).

### ARTICLE 4

#### DEDUCTIONS FROM INMATE ACCOUNTS FOR EXPENSES

#### 42-4-70. Definitions.

As used in this article, the term:

(1) "Detention facility" means a municipal or county jail used for the detention of persons charged with or convicted of either a felony, a misdemeanor, or a municipal offense.

(2) "Inmate" means a person who is detained in a detention facility by reason of being charged with or convicted of a felony, a misdemeanor, or a municipal offense.

(3) "Medical treatment" means each visit initiated by the inmate to an institutional physician; physician's extender, including a physician assistant or a nurse practitioner; dentist; optometrist; or psychiatrist for examination or treatment.

(4) "Officer in charge" means the sheriff, if the detention facility is under his supervision, or the warden, captain, or superintendent having the supervision of any other detention facility. (Code 1981, § 42-4-70, enacted by Ga. L. 1992, p. 2942, § 1; Ga. L. 1995, p. 1059, § 2; Ga. L. 1996, p. 1081, § 2; Ga. L. 2009, p. 859, § 3/HB 509.)

**The 2009 amendment**, effective July 1, 2009, substituted "physician assistant" for "physician's assistant" in paragraph (3).

**Law reviews.** — For review of 1996 legislation relating to jails, see 13 Ga. St. U.L. Rev. 269 and 273 (1996).

ARTICLE 5

REGIONAL JAIL AUTHORITIES

**42-4-102. Construction of article; bonds not subject to regulation under Georgia Uniform Securities Act; power of counties and municipalities to activate authorities.**

(a) This article shall be liberally construed to effect the purposes hereof. Sale or issuance of bonds by any authority shall not be subject to regulation under Chapter 5 of Title 10, the “Georgia Uniform Securities Act of 2008,” or any other law.

(b) A county or any number of counties or a municipality or any number of municipalities shall have the right to activate any authority under this article, notwithstanding the existence of any other authority having similar powers or purposes within the county or a municipal corporation created pursuant to any general law or amendment to the Constitution of this state. However, nothing in this article shall be construed as repealing, amending, superseding, or altering the organization of or abridging the powers of such authorities as are now in existence. (Code 1981, § 42-4-102, enacted by Ga. L. 1995, p. 292, § 1; Ga. L. 1996, p. 1098, § 7; Ga. L. 2008, p. 381, § 10/SB 358.)

**The 2008 amendment**, effective July 1, 2009, substituted ““Georgia Uniform Securities Act of 2008,”” for ““Georgia Securities Act of 1973,”” in subsection (a).

CHAPTER 5

**CORRECTIONAL INSTITUTIONS OF STATE AND COUNTIES**

**Article 1**

**General Provisions**

- Sec.  
42-5-2. Responsibilities of governmental unit with custody of inmate generally; costs of emergency and follow-up care; access to medical services or hospital care for inmates; requirements for hospitals that provide emergency health care services to state inmates.
- 42-5-9. Notification of projected release date of inmate.
- 42-5-18. Items prohibited for possession

Sec.

- by inmates; warden’s authorization; penalty.
- 42-5-19. Penalty for violating Code Section 42-5-16 or 42-5-17.

**Article 2**

**Wardens, Superintendents, and Other Personnel**

- 42-5-35. Conferral of police powers; authorization to assist local law enforcement officers or correctional officers; retention of badge.
- 42-5-36. Confidentiality of information

Sec.

supplied by inmates; penalties for breach; classified nature of department investigation reports; confidentiality of certain identifying information; custodians of records.

### Article 3

#### Conditions of Detention Generally

- 42-5-50. Transmittal of information on convicted persons; place of detention; payment for inmates not transferred to the custody of the department; notice in the event of convicted person free on bond pending appeal.
- 42-5-51. Jurisdiction over certain misdemeanor offenders; designation of place of confinement of inmates; reimbursement of county; transfer of inmates to federal authority.
- 42-5-52. (For effective date, see note.) Classification and separation of inmates generally; placement of juvenile offenders and of females; transfer of mentally diseased, alcoholic, drug addicted, or tubercular inmates.
- 42-5-52.1. Submission to HIV test; separate housing for HIV infected persons.
- 42-5-52.2. Testing of prison inmates for HIV; consolidation of inmates testing positive.
- 42-5-53. Establishment of county correctional institutions; supervision by department; quota of inmates; funding; confinement and withdrawal of inmates.
- 42-5-54. Information from inmates relating to medical insurance; provision and payment of medical treatment for inmates.

Sec.

- 42-5-55. Deductions from inmate accounts for payment of certain damages and medical costs; limit on deductions; fee for managing inmate accounts.
- 42-5-56. Visitation with minors by convicted sexual offenders.
- 42-5-60. Hiring out of inmates; participation of inmates in programs of volunteer service; sale of products produced by inmates; disposition of proceeds; payment to inmates for services.
- 42-5-63. Unauthorized possession of weapon by inmate.
- 42-5-64. Educational programming.
- 42-5-65. Victim photographs prohibited; exception.

### Article 4

#### Granting Special Leaves, Emergency Leaves, and Limited Leave Privileges

- 42-5-85. Leave privileges of inmates serving murder sentences.

### Article 6

#### Voluntary Labor Program

- 42-5-120. Rules and regulations; requirements.
- 42-5-121. Federal certification.
- 42-5-122. Conflicting legislation preempted.
- 42-5-123. Compensation by employers for administrative and other costs to the state.
- 42-5-124. Publicizing and inviting participation in programs; cooperation with the Department of Labor.
- 42-5-125. General applicability; exceptions.

---

**Editor's notes.** — Ga. L. 1998, p. 270, § 13, not codified by the General Assembly, provides: "The General Assembly recognizes that criminal street gangs have succeeded at times in maintaining their structure, organization, and discipline in

penal institutions and have continued to conduct criminal activities while incarcerated. Therefore, the General Assembly requests and encourages state and local officials with responsibility for the operation of adult and juvenile penal institu-



tions and related facilities to develop policies and procedures which will identify members of criminal street gangs and, where necessary, to separate members and associates of the same criminal street

gang in order that such gang members cannot maintain the gang's structure, organization, and discipline and will have a more difficult time in conducting criminal activities while incarcerated in this state."

## ARTICLE 1

### GENERAL PROVISIONS

#### **42-5-2. Responsibilities of governmental unit with custody of inmate generally; costs of emergency and follow-up care; access to medical services or hospital care for inmates; requirements for hospitals that provide emergency health care services to state inmates.**

(a) Except as provided in subsection (b) of this Code section, it shall be the responsibility of the governmental unit, subdivision, or agency having the physical custody of an inmate to maintain the inmate, furnishing him food, clothing, and any needed medical and hospital attention; to defend any habeas corpus or other proceedings instituted by or on behalf of the inmate; and to bear all expenses relative to any escape and recapture, including the expenses of extradition. Except as provided in subsection (b) of this Code section, it shall be the responsibility of the department to bear the costs of any reasonable and necessary emergency medical and hospital care which is provided to any inmate after the receipt by the department of the notice provided by subsection (a) of Code Section 42-5-50 who is in the physical custody of any other political subdivision or governmental agency of this state, except a county correctional institution, if the inmate is available and eligible for the transfer of his custody to the department pursuant to Code Section 42-5-50. Except as provided in subsection (b) of this Code section, the department shall also bear the costs of any reasonable and necessary follow-up medical or hospital care rendered to any such inmate as a result of the initial emergency care and treatment of the inmate. With respect to state inmates housed in county correctional institutions, the department shall bear the costs of direct medical services required for emergency medical conditions posing an immediate threat to life or limb if the inmate cannot be placed in a state institution for the receipt of this care. The responsibility for payment will commence when the costs for direct medical services exceed an amount specified by rules and regulations of the Board of Corrections. The department will pay only the balance in excess of the specified amount. Except as provided in subsection (b) of this Code section, it shall remain the responsibility of the governmental unit having the physical custody of an inmate to bear the costs of such medical and hospital care, if the custody of the inmate has been transferred from the

department pursuant to any order of any court within this state. The department shall have the authority to promulgate rules and regulations relative to payment of such medical and hospital costs by the department.

(b)(1) The officer in charge will provide an inmate access to medical services or hospital care and may arrange for the inmate's health insurance carrier to pay the health care provider for the services or care rendered as provided in Article 3 of Chapter 4 of this title.

(2) With respect to an inmate covered under Article 3 of Chapter 4 of this title, the costs of any medical services, emergency medical and hospital care, or follow-up medical or hospital care as provided in subsection (a) of this Code section for which a local governmental unit is responsible shall mean the costs of such medical services and hospital care which have not been paid by the inmate's health insurance carrier or the Department of Community Health.

(c) A hospital authority or hospital which is not a party to a contract with the Georgia Department of Corrections or its agents on July 1, 2009, shall be reimbursed no more than the applicable Georgia Medicaid rate for emergency services provided to such state inmate. For purposes of this subsection, the term "state inmate" means any inmate for whom the Georgia Department of Corrections shall be responsible for the payment of medical care thereof. Nothing in this Code section shall prohibit the Georgia Department of Corrections from negotiating higher fees or rates with health care providers. It is the intent of the General Assembly that the Georgia Department of Corrections or its agents enter into negotiations with health care providers to contract for the provision of services as provided in this Code section. (Ga. L. 1956, p. 161, § 13; Ga. L. 1982, p. 1361, §§ 1, 2; Ga. L. 1983, p. 3, § 31; Ga. L. 1986, p. 493, § 1; Ga. L. 1992, p. 2125, § 3; Ga. L. 1999, p. 296, § 24; Ga. L. 2009, p. 136, § 1A/HB 464.)

**The 1999 amendment**, effective July 1, 1999, substituted "Department of Community Health" for "Department of Medical Assistance" in paragraph (2) of subsection (b).

**The 2009 amendment**, effective April 21, 2009, added subsection (c).

**Law reviews.** — For note, "Finding Immunity: Manders v. Lee and the Erosion of 1983 Liability," see 55 Mercer L. Rev. 1505 (2004).

## JUDICIAL DECISIONS

**Extent of duty.** — This section and § 42-4-4 create an obligation merely to provide inmates with access to medical care and the county met that obligation by contracting with a local medical services provider to provide medical care to the

detention center. *Epps v. Gwinnett County*, 231 Ga. App. 664, 499 S.E.2d 657 (1998).

When officers arrested a decedent who died shortly after the arrest, the officers and a city could not be held liable for

violating O.C.G.A. § 42-4-4 or O.C.G.A. § 42-5-2 or by denying the decedent medical care because: (1) § 42-4-4 imposed a duty only upon sheriffs and deputies; (2) § 42-5-2 imposed a duty only on a governmental unit having physical custody of a detainee; and (3) the decedent was taken into custody by a county police officer and transported to a county jail, so the decedent was never in the custody of the city, and the suit could not be brought against the city under § 42-5-2. *Hoyt v. Bacon County*, No. 509-026, 2011 U.S. Dist. LEXIS 7330 (S.D. Ga. Jan. 26, 2011).

**Violation of prisoner's constitutional rights.** — Where medical policies were promulgated and carried out under the mandate of this section and the seriously ill prisoner was seen only by undertrained LPNs, not by a physician, before the prisoner died, this was a violation of a constitutional right that was coupled with causation. *Howard v. City of Columbus*, 239 Ga. App. 399, 521 S.E.2d 51 (1999), cert. denied, 530 U.S. 1215, 120 S. Ct. 2218, 147 L. Ed. 2d 250 (2000).

**Department's right to recover from third-party tortfeasor.** — Although plaintiff Department of Corrections had a duty under O.C.G.A. § 42-5-2(a) to provide medical care to its inmates, this duty did not absolve defendant driver of the driver's alleged liability for causing the inmates' injuries in an automobile accident; thus, the trial court erred in granting the driver summary judgment in the Department's suit against the driver to recover the Department's expenses incurred in treating the inmates' injuries. *Ga. Dep't of Corrs. v. Barkwell*, 256 Ga. App. 877, 570 S.E.2d 13 (2002).

**Handcuffing of persons taken to hospital.** — In an action by a hospital seeking to recover the expenses of medical treatment provided to three men brought to the hospital by a county sheriff's deputy, the fact that the three men had been handcuffed for transportation to the hospital was not determinative of their subsequent status, when the handcuffs were removed. *Macon-Bibb County Hosp. Auth. v. Reece*, 236 Ga. App. 669, 513 S.E.2d 243 (1999).

**Fact issue on custody determination.** — In an action by a hospital against

the county seeking reimbursement for medical treatment provided detainees of the sheriff's department, issues of fact as to whether the men were in custody of the county when the expenses were incurred and whether they were "inmates" precluded summary judgment for either the county or sheriff. *Macon-Bibb County Hosp. Auth. v. Reece*, 228 Ga. App. 532, 492 S.E.2d 292 (1997).

**Sovereign immunity.** — Providing adequate medical attention for inmates under defendant's custody and control is a ministerial act by the sheriff and his or her deputies and does not involve the exercise of discretion; thus, such act is not subject to either sovereign immunity or official immunity. *Cantrell v. Thurman*, 231 Ga. App. 510, 499 S.E.2d 416 (1998).

While subsection (a) imposes the duty and the cost for medical care of inmates in the custody of a county upon the county, it does not waive sovereign immunity of the county or its agents and employees. *Howard v. City of Columbus*, 239 Ga. App. 399, 521 S.E.2d 51 (1999), cert. denied, 530 U.S. 1215, 120 S. Ct. 2218, 147 L. Ed. 2d 250 (2000).

Without proof by the administrator of the decedent inmate's estate that any actions undertaken by the county officers and employees sued for wrongful death amounted to wilfulness, malice, or corruption, they were entitled to official immunity as a matter of law; further, any failure to adopt other or additional requirements as to their policies of supervision and training in dealing with a suicidal inmate did not amount to wilfulness, malice, or corruption. *Middlebrooks v. Bibb County*, 261 Ga. App. 382, 582 S.E.2d 539 (2003).

Trial court incorrectly denied a prison official's motion for summary judgment on the estate administrators' 42 U.S.C. § 1983 claim against the official, following an inmate's death from a Tylenol overdose, because, while the official was aware that the decedent faced a substantial risk of serious harm, the administrators did not show that the official displayed deliberate indifference to the decedent's serious medical needs. Furthermore, the administrators failed to prove that the official was acting outside the scope of the



person's official duties or employment; consequently, even if the official acted with malice or intent to injure the decedent, the official was immune from liability on the administrators' state law claims against the official. *Minor v. Barwick*, 264 Ga. App. 327, 590 S.E.2d 754 (2003).

County sheriff was not entitled to Eleventh Amendment immunity because, under Georgia law, the sheriff was not acting as an arm of the state when caring for the medical needs of an inmate; instead, the sheriff was carrying out a statutory duty assigned to the county under O.C.G.A. § 42-5-2(a). *Dukes v. Georgia*, 428 F. Supp. 2d 1298 (N.D. Ga. 2006), *aff'd*, 212 Fed. Appx. 916 (11th Cir. 2006).

In a parent's wrongful death action, the trial court erred in denying a county's motion for summary judgment because O.C.G.A. § 42-5-2 did not waive the county's sovereign immunity for claims based on failure to provide medical care;

§ 42-5-2 does not provide an express waiver, and nothing in the statute can be read to imply a waiver. *Gish v. Thomas*, 302 Ga. App. 854, 691 S.E.2d 900 (2010).

Trial court correctly determined that the state law claims made against a county and against a sheriff and medical contract compliance administrator in their official capacities were barred because although O.C.G.A. § 42-5-2(a) imposed upon the county the duty and cost of medical care for inmates in the county's custody, the county did not waive sovereign immunity of the county or the county's agents or employees. *Graham v. Cobb County*, 316 Ga. App. 738, 730 S.E.2d 439 (2012).

**Cited in** *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003); *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003); *Bunyon v. Burke County*, 306 F. Supp. 2d 1240 (S.D. Ga. 2004); *Lawson v. Lincoln County*, 292 Ga. App. 527, 664 S.E.2d 900 (2008).

## RESEARCH REFERENCES

**ALR.** — Duress, necessity, or conditions of confinement as justification for escape from prison, 54 ALR5th 141.

Constitutional right of prisoners to abortion services and facilities, 28 ALR6th 485.

### 42-5-9. Notification of projected release date of inmate.

At least 15 days prior to the projected release date of any inmate scheduled to be released pursuant to the authority of the department, the department shall notify the following persons of such projected release date by the following methods:

(1) Each district attorney and all local law enforcement agencies throughout the state by making the necessary information available on a publicly accessible website; and

(2) The presiding judge and the victims of crimes against the person by mail or electronic transmission. Notice to the victim shall only be required when the victim has provided the department with his or her current address. The notice to the victim or victims as required by the department in this Code section shall be reasonable notice and no liability or sanctions to the department related to notification or failure to notify shall lie against the department, its officers, or employees if said attempt at notice is of a reasonable effort. (Ga. L. 1980, p. 393, § 2; Ga. L. 2000, p. 1422, § 1; Ga. L. 2001, p. 4, § 42; Ga. L. 2005, p. 60, § 42/HB 95.)

**The 2000 amendment**, effective January 1, 2001, rewrote this Code section.

**The 2001 amendment**, effective February 12, 2001, part of an Act to revise, modernize, and correct the Code, in the last sentence of paragraph (2), revised

punctuation and substituted “in this Code section” for “herein”.

**The 2005 amendment**, effective April 7, 2005, part of an Act to revise, modernize, and correct the Code, revised language in paragraph (1).

#### **42-5-15. Crossing of guard lines with weapons, intoxicants, or drugs without consent of warden or superintendent.**

### **JUDICIAL DECISIONS**

#### **Sufficient evidence prison guard intended to distribute drugs in prison.**

— Evidence supported convictions of possession of cocaine with intent to distribute, possession of marijuana with intent to distribute, and crossing a prison guard line with drugs when the defendant, a corrections officer, was found with a cookie box containing drugs. Although the defendant claimed to be unaware of the contents of the package, none of the people the defendant named as being involved in the transaction were proven to exist, and

the jury was authorized to infer that it was unreasonable for a corrections officer to take a suspicious package from an unknown person into a prison to give to an unknown recipient; furthermore, given the large amount and variety of contraband, its high street value, and that the defendant was taking it inside a heavily guarded prison facility, the jury was authorized to infer that the defendant intended to distribute it to others instead of using it personally. *Bradley v. State*, 292 Ga. App. 737, 665 S.E.2d 428 (2008).

#### **42-5-17. Loitering near inmates after being ordered to desist.**

### **RESEARCH REFERENCES**

**ALR.** — Validity, construction, and application of loitering statutes and ordinances, 72 ALR5th 1.

#### **42-5-18. Items prohibited for possession by inmates; warden’s authorization; penalty.**

(a) As used in this Code section, the term:

(1) “Inmate” means a prisoner, detainee, criminal suspect, immigration detainee, or other person held, incarcerated, or detained in a place of incarceration.

(2) “Place of incarceration” means any prison, probation detention center, jail, or institution, including any state, federal, local, or privately operated facility, used for the purpose of incarcerating criminals or detainees.

(3) “Telecommunications device” means a device, an apparatus associated with a device, or a component of a device that enables, or may be used to enable, communication with a person outside a place of incarceration, including a telephone, cellular telephone, personal

digital assistant, transmitting radio, or computer connected or capable of being connected to a computer network, by wireless or other technology, or otherwise capable of communicating with a person or device outside of a place of incarceration.

(4) “Warden or superintendent” shall mean the commissioner or any warden, superintendent, sheriff, chief jailor, or other person who is responsible for the overall management and operation of a place of incarceration.

(b) It shall be unlawful for any person to obtain for, to procure for, or to give to an inmate a gun, pistol, or any other weapon; any intoxicating liquor; amphetamines, biphethamines, or any other hallucinogenic drugs or other drugs, regardless of the amount; any telecommunications device; or any other article or item without the authorization of the warden or superintendent or his or her designee.

(c) It shall be unlawful for an inmate to possess a gun, pistol, or any other weapon; any intoxicating liquor; amphetamines, biphethamines, or any other hallucinogenic drugs or other drugs, regardless of the amount; a telecommunications device; or any other item without the authorization of the warden or superintendent or his or her designee.

(d) A person who commits or attempts to commit a violation of this Code section shall be guilty of a felony and, upon conviction thereof, shall be imprisoned for not less than one nor more than five years; provided, however, if a person violates this Code section while being held pursuant to an arrest or conviction for a misdemeanor offense, the possession of a telecommunications device in violation of this Code section shall be treated as a misdemeanor. (Ga. L. 1976, p. 1506, § 2; Ga. L. 1984, p. 593, § 1; Ga. L. 2008, p. 533, § 1/SB 366.)

**The 2008 amendment**, effective July 1, 2008, rewrote this Code section.

## JUDICIAL DECISIONS

**Evidence sufficient for conviction** of possession of drugs by an inmate. *Webb v. State*, 249 Ga. App. 214, 547 S.E.2d 767 (2001).

Defendant’s conviction for the unauthorized possession of drugs by an inmate, contrary to O.C.G.A. § 42-5-18(b), was based on sufficient evidence, as the evidence showed that during a confiscation and inventory of defendant’s personal possessions, before moving the defendant to a new cell, a shampoo bottle containing a substance determined to be marijuana

was discovered. *Collinsworth v. State*, 276 Ga. App. 58, 622 S.E.2d 419 (2005).

**Evidence insufficient to support conviction.** — Defendant’s conviction for possession of drugs by an inmate in violation of O.C.G.A. § 42-5-18(c) was reversed because the state failed to present any evidence to support even an inference that the defendant had any prior knowledge of drugs that were found in a bag or any idea what was in the bag; the state failed to demonstrate that the defendant had the bag in the defendant’s possession for any



reason other than the performance of the defendant's assigned duties of cleaning the visitation lobby in the prison and, thus, failed to exclude the reasonable hypothesis that the defendant was merely

performing the job when the defendant removed the bag from one trash can and placed the bag in the other. *Strozier v. State*, 313 Ga. App. 804, 723 S.E.2d 39 (2012).

### RESEARCH REFERENCES

**ALR.** — Validity, construction, and application of state statute criminalizing possession of contraband by individual in

penal or correctional institution, 45 ALR5th 767.

### 42-5-19. Penalty for violating Code Section 42-5-16 or 42-5-17.

Any person who violates Code Section 42-5-16 or 42-5-17 shall be guilty of a felony and, upon conviction thereof, shall be imprisoned for not less than one nor more than five years. (Ga. L. 1961, p. 45, § 1; Ga. L. 1976, p. 1506, § 1; Ga. L. 2008, p. 533, § 2/SB 366.)

**The 2008 amendment**, effective July 1, 2008, substituted "Code Section 42-5-16 or 42-5-17" for "Code Section 42-5-16,

42-5-17, or 42-5-18" near the beginning of this Code section.

### RESEARCH REFERENCES

**ALR.** — Validity, construction, and application of loitering statutes and ordinances, 72 ALR5th 1.

## ARTICLE 2

### WARDENS, SUPERINTENDENTS, AND OTHER PERSONNEL

### 42-5-31. Oath of office of wardens and superintendents, their deputies, and other correctional officers.

### JUDICIAL DECISIONS

**Cited in** *Bradley v. State*, 292 Ga. App. 737, 665 S.E.2d 428 (2008).

### 42-5-35. Conferral of police powers; authorization to assist local law enforcement officers or correctional officers; retention of badge.

(a) The commissioner may confer all powers of a police officer of this state, including, but not limited to, the power to make summary arrests for violations of any of the criminal laws of this state and the power to carry weapons, upon wardens of county correctional institutions and upon persons in the commissioner's employment as the commissioner

deems necessary, provided that individuals so designated meet the requirements specified in all applicable laws.

(b) The commissioner or his designee may authorize certain persons in his employment to assist law enforcement officers or correctional officers of local governments in preserving order and peace when so requested by such local authorities.

(c) Correctional employees leaving the service of the department under honorable conditions who have accumulated 25 or more years of service with the department as a certified peace officer or who are killed in the line of duty shall be entitled as part of such employee's compensation to retain his or her department issued badge or have such badge given to his or her surviving family member. If a correctional employee serving in a certified position leaves the service of the department due to a disability that arose in the line of duty and the disability prevents the employee from working as a law enforcement officer, then the employee shall be entitled as part of such employee's compensation to retain his or her department issued badge regardless of his or her number of years of service with the department. The board is authorized to promulgate rules and regulations for the implementation of this subsection. (Ga. L. 1956, p. 161, § 19; Ga. L. 1972, p. 599, § 1; Ga. L. 1975, p. 1246, § 1; Ga. L. 1983, p. 672, § 1; Ga. L. 1984, p. 22, § 42; Ga. L. 1986, p. 1170, § 2; Ga. L. 1987, p. 454, § 1; Ga. L. 1988, p. 464, § 1; Ga. L. 2007, p. 274, § 1/SB 235.)

**The 2007 amendment**, effective July 1, 2007, added subsection (c).

**42-5-36. Confidentiality of information supplied by inmates; penalties for breach; classified nature of department investigation reports; confidentiality of certain identifying information; custodians of records.**

(a) Officials and employees of the department shall respect the confidential nature of information supplied by inmates who cooperate in remedying abuses and wrongdoing in the penal system. Any official or employee who breaks such a confidence and thereby subjects a cooperating inmate to physical jeopardy or harassment shall be subject to suspension or discharge.

(b) Investigation reports and intelligence data prepared by the Internal Investigations Unit of the department shall be classified as confidential state secrets and privileged under law, unless declassified in writing by the commissioner.

(c) All institutional inmate files and central office inmate files of the department shall be classified as confidential state secrets and privileged under law, unless declassified in writing by the commissioner;

provided, however, these records shall be subject to subpoena by a court of competent jurisdiction of this state.

(d)(1) As used in this subsection, the term “identifying information” means any records or information that reveals a name, residential or business address, residential or business telephone number, day and month of birth, social security number, or professional qualifications.

(2) The identifying information of any person or entity who participates in or administers the execution of a death sentence and the identifying information of any person or entity that manufactures, supplies, compounds, or prescribes the drugs, medical supplies, or medical equipment utilized in the execution of a death sentence shall be confidential and shall not be subject to disclosure under Article 4 of Chapter 18 of Title 50 or under judicial process. Such information shall be classified as a confidential state secret.

(e) The commissioner shall designate members of the department to be the official custodians of the records of the department. The custodians may certify copies or compilations, including extracts thereof, of the records of the department. Subject to the provisions of this Code section, in response to a subpoena or upon the request of any appropriate government or judicial official, the department may provide a duly authenticated copy of any record or other document. This authenticated copy may consist of a photocopy or computer printout of the requested document certified by the commissioner or his or her duly authorized representative. (Ga. L. 1968, p. 1399, § 5; Ga. L. 1983, p. 680, § 1; Ga. L. 1984, p. 22, § 42; Ga. L. 1984, p. 1361, § 1; Ga. L. 1985, p. 149, § 42; Ga. L. 1985, p. 283, § 1; Ga. L. 1997, p. 851, § 1; Ga. L. 2013, p. 1056, § 1A/HB 122.)

**The 2013 amendment**, effective July 1, 2013, added subsection (d); and redesignated former subsection (d) as present subsection (e).

**Cross references.** — Privileged communications generally, § 24-5-501 et seq.

**Law reviews.** — For article commenting on the 1997 amendment of this section, see 14 Ga. St. U.L. Rev. 230 (1997).

## JUDICIAL DECISIONS

**Cited in** Presnell v. State, 274 Ga. 246, 551 S.E.2d 723 (2001).



## ARTICLE 3

## CONDITIONS OF DETENTION GENERALLY

**42-5-50. Transmittal of information on convicted persons; place of detention; payment for inmates not transferred to the custody of the department; notice in the event of convicted person free on bond pending appeal.**

(a) The clerk of the court shall notify the commissioner of a sentence within 30 working days following the receipt of the sentence and send other documents set forth in this Code section. Such notice shall be submitted electronically and shall contain the following documents:

(1) A certified copy of the sentence;

(2) A complete history of the convicted person, including a certified copy of the indictment, accusation, or both and such other information as the commissioner may require;

(3) An affidavit of the custodian of such person indicating the total number of days the convicted person was incarcerated prior to the imposition of the sentence. It shall be the duty of the custodian of such person to transmit the affidavit provided for in this paragraph to the clerk of the superior court within ten days following the date on which the sentence is imposed;

(4) Order of probation revocation or tolling of probation; and

(5) A copy of the sentencing information report is required in all jurisdictions with an options system day reporting center certified by the department. The failure to provide the sentencing information report shall not cause an increase in the 15 day time period for the department to assign the inmate to a correctional institution as set forth in subsection (b) of this Code section.

All of the aforementioned documents shall be submitted on forms provided by the commissioner. The commissioner shall file one copy of each such document with the State Board of Pardons and Paroles within 30 working days of receipt of such documents from the clerk of the court. Except where the clerk is on a salary, the clerk shall receive from funds of the county the fee prescribed in Code Section 15-6-77 for such service.

(b) Within 15 days after the receipt of the information provided for in subsection (a) of this Code section, the commissioner shall assign the convicted person to a correctional institution designated by the commissioner in accordance with subsection (b) of Code Section 42-5-51. It shall be the financial responsibility of the correctional institution to provide for the picking up and transportation, under guard, of the

inmate to the inmate's assigned place of detention. If the inmate is assigned to a county correctional institution or other county facility, the county shall assume such duty and responsibility.

(c) The state shall pay for each such inmate not transferred to the custody of the department from a county facility the per diem rate specified by subsection (c) of Code Section 42-5-51 for each day the inmate remains in the custody of the county after the department receives the notice provided by subsection (a) of this Code section.

(d) In the event that the convicted person is free on bond pending the appeal of his or her conviction, the notice provided for in subsection (a) of this Code section shall not be transmitted to the commissioner until all appeals of such conviction have been disposed of or until the bond shall be revoked. (Ga. L. 1956, p. 161, § 13; Ga. L. 1968, p. 1399, § 1; Ga. L. 1977, p. 1098, § 9; Ga. L. 1982, p. 1364, § 1; Ga. L. 1983, p. 3, § 31; Ga. L. 1985, p. 149, § 42; Ga. L. 1990, p. 565, § 1; Ga. L. 1991, p. 94, § 42; Ga. L. 1998, p. 194, § 1; Ga. L. 2004, p. 775, § 2; Ga. L. 2010, p. 214, § 17/HB 567; Ga. L. 2012, p. 899, § 7-5/HB 1176; Ga. L. 2013, p. 141, § 42/HB 79.)

**The 1998 amendment**, effective July 1, 1998, in subsection (a), substituted "sentence and send" for "sentence, and" in the first sentence, and substituted "two" for "three" in the second sentence.

**The 2004 amendment**, effective July 1, 2004, in subsection (a), deleted "and" from the end of paragraph (a)(3), substituted "; and" for a period at the end of paragraph (a)(4), and added paragraph (a)(5).

**The 2010 amendment**, effective July 1, 2010, in the first sentence of subsection (b), substituted "Within 15 days" for "Except as otherwise provided in subsection (c) of this Code section, within 15 days" and substituted "by the commissioner" for "by him" and in the second sentence substituted "to the inmate's" for "to his"; deleted former subsection (c), which read: "In the event that the attorney for the convicted person shall file a written request with the court setting forth that the presence of the convicted person is required within the county of the conviction, or incarceration, in order to prepare and prosecute properly the appeal of the conviction, the convicted person shall not be transferred to the correctional institution as provided in subsection (b) of this Code section. In such event the convicted person

shall remain in the custody of the local jail or lockup until all appeals of the conviction shall be disposed of or until the attorney of record for the convicted person shall file with the trial court an affidavit setting forth that the presence of the convicted person is no longer required within the county in which the conviction occurred, or in which the convicted person is incarcerated, whichever event shall first occur."; redesignated former subsections (d) and (e) as present subsections (c) and (d), respectively; in present subsection (c), deleted the former first sentence, which read: "The department shall not be required to assume the custody of those inmates who have been convicted and sentenced prior to January 1, 1983, and because their conviction is under appeal have not been transferred to the custody of the department, until July 1, 1983.", and, in the second sentence, inserted "from a county facility" near the middle and deleted "on or after January 1, 1983" at the end; and inserted "or her" in present subsection (d).

**The 2012 amendment**, effective July 1, 2012, substituted "submitted electronically and shall contain" for "mailed within such time period by first-class mail and shall be accompanied by two complete and

certified sentence packages containing” in the second sentence of the introductory paragraph of subsection (a); substituted “department” for “Department of Corrections” at the end of the first sentence in paragraph (a)(5); and substituted “documents shall” for “documents will” in the first sentence of the ending undesignated paragraph following paragraph (a)(5). See editor’s note for applicability.

**The 2013 amendment**, effective April 24, 2013, part of an Act to revise, modernize, and correct the Code, revised language at the end of the last sentence of paragraph (a)(5).

**Editor’s notes.** — Ga. L. 2012, p. 899,

§ 9-1(a)/HB 1176, not codified by the General Assembly, provides: “This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act.”

**Law reviews.** — For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012).

## JUDICIAL DECISIONS

**Section is mandatory.** — This section is mandatory in its application; moreover, even if *Whidden v. State*, 160 Ga. App. 177, 287 S.E.2d 114 (1982), was applicable, the state failed to show that defendant’s removal to the state penitentiary while his appeal was pending was for his own safety, since the number of prisoners in the county jail was less than its capacity. *Helmecki v. State*, 230 Ga. App. 866, 498 S.E.2d 326 (1998).

Trial court erred in granting summary judgment in favor of a former clerk and a deputy clerk in an inmate’s action alleging that they breached their duty to notify the department of corrections of the inmate’s amended sentence as required by O.C.G.A. § 42-5-50(a), because the court of appeals previously ruled in the case that the clerks were not entitled to official immunity in their individual capacities for failing to perform the ministerial act of communicating the inmate’s sentence to the DOC, and nothing in the record following remand changed that ruling; § 42-5-50(a) is imperative, and its performance is neither discretionary nor dependent upon a direction from the parties at interest. *McGee v. Hicks*, 303 Ga. App. 130, 693 S.E.2d 130 (2010), *aff’d*, 289 Ga. 573, 713 S.E.2d 841 (2011).

**Ministerial duties of clerk.** — Because the duties of a clerk of court to forward sentencing orders to the DOC as mandated by O.C.G.A. § 42-5-50 were ministerial rather than discretionary, and

were unambiguously triggered by the filing of a sentencing order which the clerk neglected to send, the clerk was not entitled to official immunity in a prisoner’s case seeking damages for remaining incarcerated 22 months longer than necessary. *Hicks v. McGee*, 289 Ga. 573, 713 S.E.2d 841 (2011).

**Application of continuous tort doctrine to alleged violation.** — O.C.G.A. § 9-3-33, under the continuous tort doctrine, did not bar a former inmate’s negligence claim against two court clerks, based on their alleged failure to communicate the inmate’s sentence to the Department of Corrections, as the clerks’ violation of their continuing duty to communicate the inmate’s sentence to the Department resulted in continuous injury in the form of an ever-increasing illegal confinement that was not eliminated until the inmate was released from prison; hence, the trial court erred in finding that the claim was time-barred. *Hicks v. McGee*, 283 Ga. App. 678, 642 S.E.2d 379 (2007), *cert. denied*, 2007 Ga. LEXIS 512 (Ga. 2007).

**Reversal of conviction not remedy.** — Defendant could not obtain a reversal of defendant’s conviction due to an alleged violation of O.C.G.A. § 42-5-50(c) by defendant’s transfer to the state penitentiary after defendant’s conviction as: (1) defendant never obtained a ruling on his O.C.G.A. § 42-5-50(c) motion, which waived defendant’s allegation of error for



appeal purposes; (2) O.C.G.A. § 42-5-50(c) did not provide for reversal of a conviction if a trial court refused to keep a convicted defendant in the county jail; and (3) defendant failed to show that the results of defendant's appeal would have been different had defendant been held in the county jail. *Carter v. State*, 267 Ga. App. 520, 600 S.E.2d 637 (2004).

**Effect of failing to keep defendant in jail.** — O.C.G.A. § 42-5-50(c) does not provide for reversal of a conviction if a trial court refuses to keep a convicted defendant in the county jail. *Wilbanks v. State*, 251 Ga. App. 248, 554 S.E.2d 248 (2001).

**Section did not provide sufficient grounds to prevent extradition.** — Trial court properly denied a prisoner's petition for a writ of habeas corpus pursuant to O.C.G.A. § 17-13-30 seeking to block extradition; O.C.G.A. § 42-5-50 did not prevent defendant from being extradited while defendant's motion for a new trial was pending. Instead O.C.G.A. § 42-5-50 addresses the situation in which defense counsel certifies to the court that it is required that the convicted

person remain in the local jail or lockup rather than being transferred to the assigned correctional institution in order to properly prosecute an appeal of the conviction. *Bradford v. Brown*, 277 Ga. 92, 586 S.E.2d 631 (2003).

**Custody of defendant pending appeal in extraordinary circumstances.**

— Following the conviction of the defendant, a former sheriff, for murdering a successful electoral opponent, the trial court did not violate O.C.G.A. § 42-5-50(c) by denying the defense counsel's requests that the defendant remain housed in a county facility so as to give counsel access to the defendant for purposes of prosecuting an appeal, because the defendant was a high security risk, and the defendant's status as a former law enforcement officer required rotating the defendant's placement in metropolitan jails. *Dorsey v. State*, 279 Ga. 534, 615 S.E.2d 512 (2005).

**Cited in** *Eubanks v. State*, 229 Ga. App. 667, 494 S.E.2d 564 (1998); *Giles v. State*, 257 Ga. App. 65, 570 S.E.2d 375 (2002); *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003); *Walker v. State*, 289 Ga. App. 879, 658 S.E.2d 375 (2008).

#### **42-5-51. Jurisdiction over certain misdemeanor offenders; designation of place of confinement of inmates; reimbursement of county; transfer of inmates to federal authority.**

(a) The department shall have no authority, jurisdiction, or responsibility with respect to misdemeanor offenders sentenced under paragraph (1) of subsection (a) of Code Section 17-10-3 to confinement in the county or other jail, county correctional institution, or such other places as counties may provide for maintenance of county inmates. The county wherein the sentence is imposed shall have the sole responsibility of executing the sentence and of providing for the care, maintenance, and upkeep of the inmate while serving such sentence; provided, however, that, where the sentencing judge certifies to the department that the county facilities of that county are inadequate for maintaining female inmates, any female inmate may be committed to the department to serve her sentence in a state correctional institution, as may be directed by the department; provided, further, that the delivery of the female inmates to the proper place of incarceration shall be at the expense of the county of conviction.

(b) Where any person is convicted of any offense, misdemeanor, or felony and sentenced to serve time in any penal institution in this state

other than as provided in subsection (a) of this Code section, he shall be committed to the custody of the commissioner who, with the approval of the board, shall designate the place of confinement where the sentence shall be served.

(c) After proper documentation is received from the clerk of the court, the department shall have 15 days to transfer an inmate under sentence to the place of confinement. If the inmate is not transferred within the 15 days, the department shall reimburse the county, in a sum not less than \$7.50 per day per inmate and in such an amount as may be appropriated for this purpose by the General Assembly, for the cost of the incarceration, commencing 15 days after proper documentation is received by the department from the clerk of the court; provided, however, that, subject to an appropriation of funds, local governing authorities that have entered into memorandums of understanding or agreement or that demonstrate continuous attempts to enter into memorandums of understanding or agreement with the federal government under Section 287(g) of the federal Immigration and Nationality Act shall receive an additional payment in the amount of 10 percent of the established rate paid for reimbursement for the confinement of state inmates in local confinement facilities. The reimbursement provisions of this Code section shall only apply to payment for the incarceration of felony inmates available for transfer to the department, except inmates under death sentence awaiting transfer after their initial trial, and shall not apply to inmates who were incarcerated under the custody of the commissioner at the time they were returned to the county jail for trial on additional charges or returned to the county jail for any other purposes, including for the purpose of a new trial.

(d) Notwithstanding any language in the sentence as passed by the court, the commissioner may designate as a place of confinement any available, suitable, and appropriate state or county correctional institution in this state operated under the jurisdiction or supervision of the department. The commissioner shall also have sole authority to transfer inmates from one state or county correctional institution in this state to any other such institution operated by or under the jurisdiction or supervision of or approved by the board. Neither male nor female state inmates shall be assigned to serve in any manner in a county jail unless they are participating in a state sponsored project and have the approval of the commissioner and the sheriff or the jail administrator of the county. Furthermore, the commissioner may transfer to the Attorney General of the United States for confinement any inmate if it is determined that the custody, care, treatment, training, or rehabilitation of the inmate has not been adequate or in the best interest of the inmate or his fellow inmates. The commissioner is authorized to contract with the Attorney General of the United States for the custody, care,

subsistence, housing, treatment, training, and rehabilitation of such inmates. (Ga. L. 1956, p. 161, § 13; Ga. L. 1964, p. 489, § 2; Ga. L. 1968, p. 1399, § 1; Ga. L. 1972, p. 582, § 1; Ga. L. 1973, p. 1297, § 1; Ga. L. 1979, p. 376, § 1; Ga. L. 1981, p. 1434, § 1; Ga. L. 1982, p. 1364, § 2; Ga. L. 1984, p. 604, § 1; Ga. L. 1985, p. 149, § 42; Ga. L. 1985, p. 283, § 1; Ga. L. 2011, p. 794, § 14/HB 87.)

**The 2011 amendment**, effective July 1, 2011, in subsection (c), in the second sentence, substituted “shall reimburse” for “will reimburse” and added the proviso. See editor’s note for applicability.

**Editor’s notes.** — Ga. L. 2011, p. 794, § 1, not codified by the General Assembly, provides that: “This Act shall be known and may be cited as the ‘Illegal Immigration Reform and Enforcement Act of 2011.’”

Ga. L. 2011, p. 794, § 21, not codified by the General Assembly, provides that: “(a) If any provision or part of any provision of this Act or the application of the same is held invalid or unconstitutional, the invalidity shall not affect the other provisions or applications of this Act or any other part of this Act than can be given effect without the invalid provision or applica-

tion, and to this end, the provisions of this Act are severable.

“(b) The terms of this Act regarding immigration shall be construed to have the meanings consistent with such terms under federal immigration law.

“(c) The provisions of this Act shall be implemented in a manner consistent with federal laws governing immigration and civil rights.”

Ga. L. 2011, p. 794, § 22, not codified by the General Assembly, provides, in part, that the amendment of this Code section by that Act shall apply to offenses and violations occurring on or after July 1, 2011.

**Law reviews.** — For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 35 (2011).

## JUDICIAL DECISIONS

**Standing.** — Because a county could sue the state agencies by challenging the constitutionality of O.C.G.A. §§ 42-9-49 and 42-5-51(c) (regarding reimbursement of the detention costs of certain state inmates), and because the county did not dispute that the agencies complied with the sections, the trial court should have granted the agencies’ motion for summary judgment. *Ga. Dep’t of Corr. v. Chatham County*, 274 Ga. App. 865, 619 S.E.2d 373 (2005).

**County was without authority.** — Where defendant was sentenced as a felon upon his plea of guilty to the felony of making terroristic threats and misdemeanor battery, the court did not have authority to sentence him to a county jail and the county had no authority to calculate his jail time. *Eubanks v. State*, 229 Ga. App. 667, 494 S.E.2d 564 (1998).

**Language in sentence designating place of incarceration surplusage.**

A trial court cannot require the Department of Corrections to place a convicted felon in a particular facility; however, language in a sentence purporting to designate a place of confinement is mere surplusage and is not a defect that will render the sentence void. *Stewart v. State*, 285 Ga. App. 760, 647 S.E.2d 411 (2007).

**Trial court lacked jurisdiction over defendant once imprisonment imposed.** — Once a felony conviction was entered, and a defendant was sentenced to incarceration, the trial court lacked the authority to designate where that defendant must serve the incarceration, since this decision lies solely with the Department of Corrections under O.C.G.A. § 42-5-51(b). *Florescu v. State*, 276 Ga. App. 264, 623 S.E.2d 147 (2005).



**Cited** in *Manders v. Lee*, 338 F.3d 1304 (11th Cir. 2003).

## OPINIONS OF THE ATTORNEY GENERAL

### ANALYSIS

#### GENERAL CONSIDERATION

##### General Consideration

The reimbursement provisions of O.C.G.A. § 42-5-51(c) do not apply to probationers awaiting transfer to proba-

tion detention centers or probation diversion centers. 2002 Op. Att'y Gen. No. 2002-1.

**42-5-52. (For effective date, see note.) Classification and separation of inmates generally; placement of juvenile offenders and of females; transfer of mentally diseased, alcoholic, drug addicted, or tubercular inmates.**

(a) The department shall provide for the classification and separation of inmates with respect to age, first offenders, habitual criminals and incorrigibles, diseased inmates, mentally diseased inmates, and those having contagious, infectious, and incurable diseases. Incorrigible inmates in county correctional institutions shall be returned to the department at the request of the proper county authority.

(b) (For effective date, see note.) The department may establish separate correctional or similar institutions for the separation and care of juvenile offenders. The commissioner may transfer any juvenile under 17 years of age from the penal institution in which he or she is serving to the Department of Juvenile Justice, provided that the transfer is approved thereby. The juvenile may be returned to the custody of the commissioner when the commissioner of juvenile justice determines that the juvenile is unsuited to be dealt with therein. The commissioner may accept a juvenile for transfer into a penal institution upon the request of the commissioner of juvenile justice if such juvenile is 16 years of age or older and has been committed to the Department of Juvenile Justice for a class A designated felony act or class B designated felony act, as defined by Code Section 15-11-2, and such juvenile's behavior presents a substantial danger to any person at or within a Department of Juvenile Justice facility. In the event of such transfer, the department shall have the same authority over and responsibility for such juvenile as the Department of Juvenile Justice has for such juvenile and shall maintain sight and sound separation as set forth in paragraph (5) of subsection (c) of Code Section 15-11-504.

(c) Female inmates shall be removed from proximity to the place of detention for males and shall not be confined in a county correctional institution or other county facility except with the express written approval of the department.

(d) The department is authorized to transfer a mentally diseased inmate from a state or county correctional institution or other facility operating under its authority to a criminal ward or facility of the Department of Behavioral Health and Developmental Disabilities. The inmate shall remain in the custody of the Department of Behavioral Health and Developmental Disabilities until proper officials of the facility at which the inmate is detained declare that his or her sanity has been restored, at which time the inmate shall be returned to the custody of the department. At any time after completion of his or her sentence, an inmate detained by the Department of Behavioral Health and Developmental Disabilities on the grounds that he or she is mentally diseased may petition for release in accordance with the procedure provided in Chapter 3 of Title 37. Prior to completion of his or her sentence, this procedure shall not be available to the inmate.

(e) Upon being presented with a proper certification from the county physician of a county where a person has been sentenced to confinement that the person sentenced is addicted to drugs or alcohol to the extent that the person's health will be impaired or life endangered if immediate treatment is not rendered, the department shall transfer the inmate to the custody of the Department of Behavioral Health and Developmental Disabilities. The inmate shall remain in such custody until officials of the Department of Behavioral Health and Developmental Disabilities determine the inmate is able to serve his or her sentence elsewhere.

(f) The department may transfer any inmate afflicted with active tuberculosis from any state or county correctional institution, or any other facility operating under the authority of the department, to a tubercular ward or facility specially provided and maintained for criminals by the department at a tuberculosis facility or facilities operating under the Department of Public Health. (Ga. L. 1897, p. 71, § 8; Penal Code 1910, § 1203; Ga. L. 1931, Ex. Sess., p. 118, §§ 8, 9; Code 1933, §§ 77-317, 77-318, 77-319; Ga. L. 1956, p. 161, § 14; Ga. L. 1957, p. 477, § 2; Ga. L. 1960, p. 234, § 1; Ga. L. 1962, p. 699, § 1; Ga. L. 1991, p. 94, § 42; Ga. L. 1992, p. 1983, § 21; Ga. L. 1997, p. 1453, §§ 1, 2; Ga. L. 2009, p. 453, § 3-23/HB 228; Ga. L. 2011, p. 705, § 6-3/HB 214; Ga. L. 2013, p. 294, § 2-1/HB 242.)

**Delayed effective date.** — Subsection (b), as set out above, becomes effective January 1, 2014. For version of subsection (b) in effect until January 1, 2014, see the 2013 amendment note.

**The 2009 amendment,** effective July 1, 2009, in subsection (d), substituted “Department of Behavioral Health and Developmental Disabilities” for “Department of Human Resources” three times, in the

second sentence, substituted “the inmate is detained declare that his or her sanity” for “he is detained declare that his sanity”, inserted “or her” in the last two sentences, inserted “or she” in the next-to-last sentence, and substituted “the inmate” for “him” at the end; in subsection (e), in the first sentence, substituted “the person’s health will be impaired or life” for “his health will be impaired or his life” near

the middle, and substituted “Department of Behavioral Health and Developmental Disabilities” for “Department of Human Resources” at the end, and, in the last sentence, substituted “Department of Behavioral Health and Developmental Disabilities determine the inmate is able to serve his or her sentence” for “Department of Human Resources determine he is able to serve his sentence”; and, in subsection (f), substituted “Department of Community Health” for “Department of Human Resources” at the end.

**The 2011 amendment**, effective July 1, 2011, substituted “Department of Public Health” for “Department of Community Health” at the end of subsection (f).

**The 2013 amendment**, effective January 1, 2014, in subsection (b), inserted “or she” in the second sentence, and added the fourth and fifth sentences. See editor’s note for applicability.

**Editor’s notes.** — Ga. L. 2013, p. 294, § 5-1/HB 242, not codified by the General Assembly, provides that: “This Act shall become effective on January 1, 2014, and shall apply to all offenses which occur and juvenile proceedings commenced on and after such date. Any offense occurring before January 1, 2014, shall be governed by the statute in effect at the time of such offense and shall be considered a prior adjudication for the purpose of imposing a disposition that provides for a different penalty for subsequent adjudications, of whatever class, pursuant to this Act. The enactment of this Act shall not affect any prosecutions for acts occurring before January 1, 2014, and shall not act as an abatement of any such prosecutions.”

**Law reviews.** — For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 147 (2011).

## JUDICIAL DECISIONS

**Cited in** *Southerland v. Ga. Dep’t of Corr.*, 293 Ga. App. 56, 666 S.E.2d 383 (2008).

### 42-5-52.1. Submission to HIV test; separate housing for HIV infected persons.

(a) Any term used in this Code section and defined in Code Section 31-22-9.1 shall have the meaning provided for that term in Code Section 31-22-9.1.

(b) Where any person is committed to the custody of the commissioner to serve time in any penal institution of this state on and after July 1, 1988, the department shall require that person to submit to an HIV test within 30 days after the person is so committed unless that person is in such custody because of having committed an AIDS transmitting crime and has already submitted to an HIV test pursuant to Code Section 17-10-15.

(c) No later than December 31, 1991, the department shall require to submit to an HIV test each person who has been committed to the custody of the commissioner to serve time in a penal institution of this state and who remains in such custody, or who would be in such custody but for having been transferred to the custody of the Department of Human Resources (now known as the Department of Behavioral Health and Developmental Disabilities) under Code Section 42-5-52, if that person has not submitted to an HIV test following that person’s most



recent commitment to the custody of the commissioner and unless that person is in such custody because of having committed an AIDS transmitting crime and has already submitted to an HIV test pursuant to Code Section 17-10-15.

(d) Upon failure of an inmate to cooperate in HIV test procedures under this Code section, the commissioner may apply to the superior court for an order authorizing the use of such measures as are reasonably necessary to require submission to the HIV test. Nothing in this Code section shall be construed to limit the authority of the department to require inmates to submit to an HIV test.

(e) Any person determined by the department to be an HIV infected person, whether or not by the test required by this Code section, should be housed separately at existing institutions from any other persons not infected with HIV if:

- (1) That person is reasonably believed to be sexually active while incarcerated;
- (2) That person is reasonably believed to be sexually predatory either during or prior to incarceration; or
- (3) The commissioner determines that other conditions or circumstances exist indicating that separate confinement would be in the best interest of the department and the inmate population,

but neither the department nor any officials, employees, or agents thereof shall be civilly or criminally liable for failing or refusing to house HIV infected persons separately from any other persons who are not HIV infected persons. (Code 1981, § 42-5-52.1, enacted by Ga. L. 1988, p. 1799, § 9; Ga. L. 2009, p. 453, § 3-24/HB 228.)

**The 2009 amendment**, effective July 1, 2009, inserted “(now known as the Department of Behavioral Health and Developmental Disabilities)” near the middle of subsection (c).

**RESEARCH REFERENCES**

**ALR.** — Federal constitutional and statutory claims by HIV-positive inmates as to medical treatment or conditions of confinement, 162 ALR Fed. 181.

**42-5-52.2. Testing of prison inmates for HIV; consolidation of inmates testing positive.**

(a) For purposes of this Code section, “HIV” means HIV as defined by Code Section 31-22-9.1.

(b) The department shall implement an HIV testing program whereby any state inmate who has been in the custody of a state penal institution for one year or longer and who has not previously tested

positive for HIV shall be tested for HIV within 30 days prior to his or her expected date of release from the custody of the department.

(c) Each person tested as provided in subsection (b) of this Code section shall be notified by the department in writing of the results of such testing prior to his or her release. Prior to the release of any person testing positive for HIV, the appropriate information as required by Code Sections 24-12-21 and 31-22-9.2 or other law shall be provided by the department to the Department of Public Health. Prior to the release of any person testing positive for HIV, the department shall also provide to such person in writing contact information regarding medical, educational, and counseling services available through the Department of Public Health. Any person testing positive for HIV shall be provided instruction relating to living with HIV, the prevention of the spread of such virus, and the legal consequences of infecting unknowing partners.

(d) The department shall seek state and federal grants or other possible sources of revenue for the purpose of funding a program of HIV testing authorized by this Code section. In addition, the department is authorized to accept gifts, subject to the approval of the board, for the purpose of funding such program.

(e) The department shall consolidate inmates who have tested positive for HIV in a manner that most efficiently provides education, counseling, and treatment for such persons.

(f) The provisions of this Code section shall not be construed to limit the provision for HIV testing in Code Section 42-9-42.1. (Code 1981, § 42-5-52.2, enacted by Ga. L. 2009, p. 611, § 1/SB 64; Ga. L. 2011, p. 99, § 61/HB 24; Ga. L. 2011, p. 705, § 6-3/HB 214.)

**Effective date.** — This Code section became effective July 1, 2009.

**The 2011 amendments.** — The first 2011 amendment, effective January 1, 2013, substituted “Code Sections 24-12-21” for “Code Sections 24-9-47” near the beginning of the second sentence of subsection (c). See editor’s note for applicability. The second 2011 amendment, effective July 1, 2011, substituted “Department of Public Health” for “Department of Community Health” in the second and third sentences of subsection (c).

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2009, “Department of Community Health” was substi-

tuted for “Department of Human Resources” in the second and third sentences of subsection (c).

**Editor’s notes.** — Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that this Act shall apply to any motion made or hearing or trial commenced on or after January 1, 2013.

**Law reviews.** — For article, “Evidence,” see 27 Ga. St. U.L. Rev. 1 (2011). For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011). For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 147 (2011).

**42-5-53. Establishment of county correctional institutions; supervision by department; quota of inmates; funding; confinement and withdrawal of inmates.**

(a) Subject to the provisions stated in this Code section, any county may purchase, rent, establish, construct, and maintain a county correctional institution for the care and detention of all inmates assigned to it by the department. The county may contract with other counties relative to the joint care, upkeep, and working of the inmates in such counties. Each county may pay its pro rata share of such expenses by taxes assessed and levied as provided by law.

(b) All county correctional institutions established by the counties as provided in subsection (a) of this Code section shall be subject to supervision and control by the department, and the board shall promulgate rules and regulations governing the administration and operation thereof.

(c)(1) Each county establishing a county correctional institution which complies with the rules and requirements established by the board and which is approved by the board shall receive a quota of inmates in accordance with such methods of apportionment as may be established by the board.

(2) The department is authorized, pursuant to rules and regulations adopted by the board, to pay funds, in an amount appropriated by the General Assembly for the purposes specified in paragraph (1) of this subsection, for each state inmate assigned to a county correctional institution to the county operating the facility. The amount so paid shall be determined on the basis of an equal amount per day for each state inmate assigned to the county correctional institution.

(3) Each county is authorized to use the money paid to it pursuant to paragraph (2) of this subsection for the operation and maintenance of the county correctional institution or may use the money so paid to supplant county funds or previous levels of county funding for the county correctional institution. Following a full hearing, the board is given the authority to withhold payment or withdraw all inmates from any county correctional institution which does not at any time meet or comply with the rules, regulations, and requirements of the board or comply with its directions.

(d) In all cases in which an inmate is the sole responsibility of a county and the board has no authority, jurisdiction, or responsibility with respect to the sentence of the inmate, the county may confine the inmate in a county correctional institution established pursuant to this Code section. Counties without a county correctional institution may



contract with counties having a county correctional institution to maintain the inmate.

(e) Nothing in this Code section shall be construed to prohibit the board from withdrawing inmates from any county correctional institution which does not at any time comply with the rules and regulations of the board promulgated pursuant to Code Section 42-5-10 or from withdrawing inmates from any county correctional institution which does not at any time meet the requirements of the board or comply with its directives. For reasons other than the failure to comply with the rules, regulations, requirements, and directives, the board is authorized to withdraw all inmates under its jurisdiction from all county correctional institutions under the following conditions:

(1) That such withdrawal shall include all inmates under the jurisdiction of the board assigned to all county correctional institutions and that the withdrawal shall be completed within one year after the effective date of the beginning of the withdrawal;

(2) That all county correctional institutions shall be notified at least one year in advance of the effective date of the beginning of the withdrawal;

(3) That each county affected by the withdrawal shall have the option of selling or leasing its county correctional institution to the department, provided the House Committee on State Properties and the Senate State Institutions and Property Committee shall certify to the department that the facility is suitable for inmate housing and provided, further, that the sale price of the facility or the lease rental payments for the facility shall be determined by a board of three appraisers selected as follows:

(A) One to be selected by the department;

(B) One to be selected by the governing authority of the county; and

(C) The third to be selected by the other two appraisers;

(4) That each county affected by the withdrawal shall have 30 days from the date of the issuance of the notice required by paragraph (2) of this subsection to notify the department that the facility is to be sold to the department, the facility is to be leased to the department, or the county will keep and maintain the facility for its own use. If the department is not so notified within the time limitation, the department shall be under no obligation to lease or purchase the facility;

(5) That if the county elects to sell or lease the facility, the committees named in paragraph (3) of this subsection shall have 60 days from the time the department is notified of such decision in

which to inspect the facility and make its recommendations and certification to the department;

(6) That if any such facility is leased by the department, the term of the lease, the requirements relative to the repair, maintenance, and improvements of the facility by the county, and the requirements relative to the renewal of the lease shall be as agreed upon by the department and the governing authority of the county; and

(7) That the sales price or lease rental payments for each facility and the requirements relative to the lease contract when the facility is leased shall be determined within six months after the issuance of the notice of the effective date of the beginning of the withdrawal required by paragraph (2) of this subsection and that, if they are not determined within the time limitation, the department shall be under no obligation to lease or purchase the facility. (Ga. L. 1956, p. 161, § 16; Ga. L. 1964, p. 491, § 1; Ga. L. 1970, p. 318, § 1; Ga. L. 1975, p. 908, § 1; Ga. L. 1980, p. 470, § 1; Ga. L. 1982, p. 3, § 42; Ga. L. 1985, p. 283, § 1; Ga. L. 1991, p. 94, § 42; Ga. L. 1995, p. 10, § 42; Ga. L. 2009, p. 303, § 3/HB 117; Ga. L. 2013, p. 141, § 42/HB 79.)

**The 2009 amendment**, effective April 30, 2009, substituted “Senate State Institutions and Property Committee” for “Corrections, Correctional Institutions and Property Committee of the Senate” in paragraph (e)(3). See the Editor’s note for intent.

**The 2013 amendment**, effective April 24, 2013, part of an Act to revise, modernize, and correct the Code, substituted “House Committee on State Properties” for “State Institutions and Property Com-

mittee of the House of Representatives” in paragraph (e)(3).

**Editor’s notes.** — Ga. L. 2009, p. 303, § 20, not codified by the General Assembly, provides that: “This Act is intended to reflect the current internal organization of the Georgia Senate and House of Representatives and is not otherwise intended to change substantive law. In the event of a conflict with any other Act of the 2009 General Assembly, such other Act shall control over this Act.”

## JUDICIAL DECISIONS

**DOC was immune from suit for negligence of county employees in handling state prisoner.** — County that housed state inmates in the county’s prison under O.C.G.A. § 42-5-53 functioned as an independent contractor for which the state did not waive sovereign immunity under the Georgia Tort Claims Act, O.C.G.A. § 50-21-20, et seq.; therefore, the State Department of Corrections

was entitled to be dismissed from the inmate’s suit based on sovereign immunity. Ga. Dep’t of Corr. v. James, 312 Ga. App. 190, 718 S.E.2d 55 (2011), cert. denied, No. S12C0381, 2012 Ga. LEXIS 539 (Ga. 2012).

**Cited** in Williams v. Georgia Dep’t of Cors., 224 Ga. App. 571, 481 S.E.2d 272 (1997); Manders v. Lee, 338 F.3d 1304 (11th Cir. 2003).

**42-5-54. Information from inmates relating to medical insurance; provision and payment of medical treatment for inmates.**

(a) As used in this Code section, the term:

(1) "Detention facility" means a county correctional institution, workcamp, or other county detention facility used for the detention of persons convicted of a felony or a misdemeanor.

(2) "Inmate" means a person who is detained in a detention facility by reason of being convicted of a felony or a misdemeanor and who is insured under existing individual health insurance, group health insurance, or prepaid medical care coverage or is eligible for benefits under Article 7 of Chapter 4 of Title 49, the "Georgia Medical Assistance Act of 1977." Such term does not include any sentenced inmate who is the responsibility of the Department of Corrections.

(3) "Officer in charge" means the warden, captain, or superintendent having the supervision of any detention facility.

(b) The officer in charge or his or her designee may require an inmate to furnish the following information:

(1) The existence of any health insurance, group health plan, or prepaid medical care coverage under which the inmate is insured;

(2) The eligibility for benefits to which the inmate is entitled under Article 7 of Chapter 4 of Title 49, the "Georgia Medical Assistance Act of 1977";

(3) The name and address of the third-party payor; and

(4) The policy or other identifying number.

(c) The officer in charge will provide a sick, injured, or disabled inmate access to medical services and may arrange for the inmate's health insurance carrier to pay the health care provider for the medical services rendered.

(d) The liability for payment for medical care described under subsection (b) of this Code section may not be construed as requiring payment by any person or entity, except by an inmate personally or by his or her carrier through coverage or benefits described under paragraph (1) of subsection (b) of this Code section or by or at the direction of the Department of Community Health pursuant to paragraph (2) of such subsection.

(e) Nothing in this Code section shall be construed to relieve the governing authority, governmental unit, subdivision, or agency having the physical custody of an inmate from its responsibility to pay for any



medical and hospital care rendered to such inmate regardless of whether such individual has been convicted of a crime. (Code 1981, § 42-5-54, enacted by Ga. L. 1996, p. 1081, § 3; Ga. L. 1999, p. 296, § 24.)

**The 1999 amendment**, effective July 1, 1999, substituted “Department of Community Health” for “Department of Medical Assistance” in subsection (d).

### JUDICIAL DECISIONS

**Supervision of prisoners discretionary function.** — The supervision of a prisoner work detail is a discretionary function by virtue of which the supervisor is entitled to official immunity. *Parrish v. State*, 270 Ga. 878, 514 S.E.2d 834 (1999), reversing *Simmons v. Coweta County*, 229 Ga. App. 550, 494 S.E.2d 362 (1997).

### 42-5-55. Deductions from inmate accounts for payment of certain damages and medical costs; limit on deductions; fee for managing inmate accounts.

- (a) As used in this Code section, the term:
  - (1) “Chronic illness” means an illness requiring care and treatment over an extended period of time. Chronic illness includes, but is not limited to, hypertension, diabetes, pulmonary illness, a seizure disorder, acquired immune deficiency syndrome, cancer, tuberculosis B, hepatitis C, rheumatoid arthritis, an autoimmune disorder, and renal disease.
  - (2) “Detention facility” means a state, county, or private correctional institution, workcamp, or other state or county detention facility used for the detention of persons convicted of a felony or a misdemeanor.
  - (3) “Inmate” means a person who is detained in a detention facility by reason of being convicted of a felony or a misdemeanor.
  - (4) “Medical treatment” means each visit initiated by the inmate to an institutional physician; physician’s extender, including a physician assistant or a nurse practitioner; registered nurse; licensed practical nurse; medical assistant; dentist; dental hygienist; optometrist; or psychiatrist for examination or treatment.
  - (5) “Officer in charge” means the warden, captain, or superintendent having the supervision of any detention facility.
- (b) The commissioner or, in the case of a county or private facility, the officer in charge may establish by rules or regulations criteria for a reasonable deduction from money credited to the account of an inmate to:

- (1) Repay the costs of:

(A) Public property or private property in the case of an inmate housed in a private correctional facility willfully damaged or destroyed by the inmate during his or her incarceration;

(B) Medical treatment and prescription medication for injuries inflicted by the inmate upon himself or herself or others unless the inmate has a severe mental health designation as determined by the department;

(C) Searching for and apprehending the inmate when he or she escapes or attempts to escape; such costs to be limited to those extraordinary costs incurred as a consequence of the escape; or

(D) Quelling any riot or other disturbance in which the inmate is unlawfully involved; or

(2) Defray the costs paid by the state or county for:

(A) Medical treatment for an inmate when the request for medical treatment has been initiated by the inmate; and

(B) Medication prescribed for the treatment of a medical condition unrelated to pregnancy or a chronic illness.

(c) The provisions of paragraph (2) of subsection (b) of this Code section shall in no way relieve the governmental unit, agency, or subdivision having physical custody of an inmate from furnishing him or her with needed medical treatment.

(d) Notwithstanding any other provisions of this Code section, the deductions from money credited to the account of an inmate as authorized under subsection (b) of this Code section shall not be made whenever the balance in the inmate's account is \$10.00 or less.

(e) The officer in charge of any detention facility is authorized to charge a fee for establishing and managing inmate money accounts. Such fee shall not exceed \$1.00 per month. (Code 1981, § 42-5-55, enacted by Ga. L. 1996, p. 1081, § 3; Ga. L. 2003, p. 252, § 3; Ga. L. 2009, p. 136, § 1/HB 464; Ga. L. 2009, p. 859, § 3/HB 509.)

**The 2003 amendment**, effective July 1, 2003, substituted “state, county, or private” for “state or county” in paragraph (a)(1); and, in subsection (b), inserted “or private” near the beginning of the introductory language, and inserted “or private property in the case of an inmate housed in a private correctional facility” in subparagraph (b)(1)(A).

**The 2009 amendments.** — The first 2009 amendment, effective April 21, 2009, in subsection (a), added paragraph (a)(1) and redesignated former paragraphs

(a)(1) through (a)(4) as present paragraphs (a)(2) through (a)(5), respectively; and in subsection (b), in subparagraph (b)(1)(B), inserted “and prescription medication” and added “unless the inmate has a severe mental health designation as determined by the department” at the end, and, in paragraph (b)(2), substituted “for: (A) Medical treatment” for “for medical treatment”, in subparagraph (b)(2)(A), added “; and” at the end, and added subparagraph (b)(2)(B). The second 2009 amendment, effective July 1, 2009,

substituted "physician assistant" for "physician's assistant" in paragraph (a)(3) (now paragraph (a)(4)).

#### **42-5-56. Visitation with minors by convicted sexual offenders.**

(a) As used in this Code section, the term "sexual offense" means a violation of Code Section 16-6-1, relating to the offense of rape; Code Section 16-6-2, relating to the offenses of sodomy and aggravated sodomy; Code Section 16-6-5.1, relating to the offense of sexual assault against a person in custody; Code Section 16-6-22, relating to the offense of incest; or Code Section 16-6-22.2, relating to the offense of aggravated sexual battery, when the victim was under 18 years of age at the time of the commission of any such offense; or a violation of Code Section 16-6-3, relating to the offense of statutory rape; Code Section 16-6-4, relating to the offenses of child molestation and aggravated child molestation; or Code Section 16-6-5, relating to the offense of enticing a child for indecent purposes, when the victim was under 16 years of age at the time of the commission of any such offense.

(b) Any inmate with a current or prior conviction for any sexual offense as defined in subsection (a) of this Code section shall not be allowed visitation with any person under the age of 18 years unless such person is the spouse, son, daughter, brother, sister, grandson, or granddaughter of the inmate and such person is not the victim of a sexual offense for which the inmate was convicted. If visitation with a minor is restricted by court order, permission for special visitation with the minor may be granted only by the court issuing such order. (Code 1971, § 42-5-56, enacted by Ga. L. 1999, p. 591, § 1.)

**Effective date.** — This Code section became effective July 1, 1999.

**Editor's notes.** — The former provisions of this Code section, concerning temporary transfer of convicted persons pend-

ing appeal and adoption of rules and regulations by the board, were based on Ga. L. 1971, p. 341, § 4, and were repealed by Ga. L. 1982, p. 1364, § 3, effective January 1, 1983.

#### **42-5-58. Prohibition against corporal punishment; use of handcuffs, leg chains, and other restraints; permissible punishment generally.**

### **JUDICIAL DECISIONS**

**Cited** in *Jenkins v. Department of Cors.*, 238 Ga. App. 336, 518 S.E.2d 730 (1999).



**42-5-59. Employment of inmates in the local community.**

**Law reviews.** — For annual survey on workers' compensation, see 61 Mercer L. Rev. 399 (2009).

**JUDICIAL DECISIONS**

**Confinement even when participating in work release programs.** — Even when an inmate was physically at a bakery on a work release program, the inmate was still legally "confined" under O.C.G.A. § 42-5-59(a). Thus, there was no error in finding that the inmate's participation in

the work release program was part of the inmate's punishment and that, as a result, the inmate was not entitled to workers' compensation benefits. *Clarke v. Country Home Bakers*, 294 Ga. App. 302, 669 S.E.2d 177 (2008).

**42-5-60. Hiring out of inmates; participation of inmates in programs of volunteer service; sale of products produced by inmates; disposition of proceeds; payment to inmates for services.**

(a)(1) The board shall provide rules and regulations governing the hiring out of inmates by any penal institution under its authority to municipalities, cities, the Department of Transportation, and any other political subdivision, public authority, public corporation, agency, or state or local government, which entities are authorized by this subsection to contract for and receive the inmates. Such inmates shall not be hired out to private persons or corporations, nor shall any instrumentality of government authorized by this subsection to utilize penal labor use such labor in any business conducted for profit, except as provided in Code Section 42-5-59; provided, however, that:

(A) Inmate trainees enrolled in any vocational, technical, or educational training program authorized and supported by the department may repair or otherwise utilize any privately owned property or equipment as well as any other property or equipment in connection with the activities of any such training program, so long as the repair or utilization contributes to the inmate's acquisition of any desired vocational, technical, or educational skills; and

(B) To the extent authorized by the rules and regulations of the board, inmates may be allowed to participate in programs of volunteer service as authorized by this subparagraph. The rules and regulations of the board shall prescribe criteria for nonprofit organizations eligible to receive volunteer services. Such criteria shall require that any participating nonprofit organization be qualified as exempt from taxation under Section 501(c)(3) of the Internal Revenue Code of 1986 and shall give consideration in

determining eligibility to the nonprofit organization's history of service activities and the length of time for which it has been in existence and providing such services. Any such volunteer service program shall include elements whereby the volunteer inmates provide services of benefit to the community while receiving training or work experience suitable for their rehabilitation. The board may authorize such voluntary inmate participation, notwithstanding the fact that the nonprofit organization may receive direct or indirect payment as a result of such inmate participation; notwithstanding the fact that the services rendered may provide some degree of benefit to private individuals or organizations or both; and notwithstanding the fact that some inmate participation may take place outside the confines of a penal institution.

(2) Notwithstanding any other provisions of this subsection, any private person, organization, or corporation with whom the commissioner has contracted for the land acquisition, design, construction, operation, maintenance, use, lease, or management of a state prison or for any services related to the custody, care, and control of inmates as authorized by Code Section 42-2-8 may utilize penal labor in the same manner as any such labor may be utilized by any other penal institution operated under the authority of the board. Agreements made pursuant to Code Section 42-2-8 for the land acquisition, design, construction, operation, maintenance, use, lease, or management of a state prison or for any services related to the care, custody, and control of inmates shall factor the value of penal labor such that the state is the only financial beneficiary of the same.

(b) No goods, wares, or merchandise which have been manufactured, produced, or mined, wholly or in part, by the inmates of any state or county correctional institution operated under the jurisdiction of the board shall be sold in this state to any private person, firm, association, or corporation, except that this prohibition shall not apply to:

(1) Sales to private colleges and universities;

(2) A sale to a private contractor of goods, wares, or merchandise for use in the completion of a publicly funded project; or

(3) Sales to privately owned correctional facilities that house inmates from the State of Georgia.

Nothing in this subsection shall be construed to forbid the sale of such goods or merchandise to other political subdivisions, public authorities, municipalities, or agencies of the state or local governments to be consumed by them or to agencies of the state to be in turn sold by the agency to the public in the performance of the agency's duties as required by law. This subsection does not prohibit the sale of unprocessed agricultural products produced on state property.

(c) Funds arising from the sale of goods or other products manufactured or produced by any state correctional institution operated by the department shall be deposited with the treasury of the department. The funds arising from the sale of goods and products produced in a county correctional institution or from the hiring out of inmates shall be placed in the treasury or depository of the county, as the case may be. The department is authorized, pursuant to rules and regulations adopted by the board, to pay compensation of not more than \$25.00 per month from funds available to the department to each inmate employed in any industry.

(d) Any superintendent, warden, guard, official, or other person who violates this Code section or any regulations promulgated pursuant thereto, relating to the sale of goods or products manufactured or produced in a correctional institution or the hiring out of inmates, shall be guilty of a misdemeanor.

(e) The department or any state correctional institution or county correctional institution operating under jurisdiction of the board shall be authorized to require inmates coming into its custody to labor on the public roads or public works or in such other manner as the board may deem advisable, including without limitation any labor authorized under Chapter 15A of Title 17. The department may also contract with municipalities, cities, counties, the Department of Transportation, or any other political subdivision, public authority, public corporation, or agency of state or local government created by law, which entities are authorized by this Code section to contract with the department, for the construction, repair, or maintenance of roads, bridges, public buildings, and any other public works by use of penal labor.

(f) Any provision of this chapter to the contrary notwithstanding, any inmate of any state or county correctional institution operated under the jurisdiction of the board may sell goods, wares, and merchandise created by such inmate through the pursuit of a hobby or recreational activity. The proceeds from the sales shall be distributed to the particular inmate who created the goods, wares, or merchandise. The board is authorized to promulgate rules and regulations governing the sale of such goods, wares, and merchandise and the distribution of the proceeds from the sales. All goods, wares, and merchandise created by an inmate must be sold within the institution or on the institution grounds during visiting hours or when on off-duty assignments. (Ga. L. 1956, p. 161, § 22; Ga. L. 1957, p. 477, § 4; Ga. L. 1968, p. 1092, § 1; Ga. L. 1968, p. 1399, §§ 2, 3; Ga. L. 1971, p. 581, § 1; Ga. L. 1972, p. 577, § 1; Ga. L. 1984, p. 651, § 1; Ga. L. 1985, p. 149, § 42; Ga. L. 1992, p. 6, § 42; Ga. L. 1993, p. 629, § 1; Ga. L. 1997, p. 851, § 2; Ga. L. 2000, p. 1584, § 1; Ga. L. 2001, p. 1090, § 1; Ga. L. 2003, p. 252, § 4.)



**The 2000 amendment**, effective May 1, 2000, in subsection (b), substituted “have” for “has” in the introductory language, deleted “or” at the end of paragraph (1), substituted “; or” for the period at the end of paragraph (2), and added paragraph (3).

**The 2001 amendment**, effective July 1, 2001, in subsection (a), added the paragraph designations, substituted “that:” for “; inmate” at the end of the introductory language of paragraph (1), in subpara-

graph (a)(1)(A), added “Inmate” at the beginning and added “; and” at the end, and added subparagraph (a)(1)(B).

**The 2003 amendment**, effective July 1, 2003, added “, including without limitation any labor authorized under Chapter 15A of Title 17” at the end of the first sentence of subsection (e).

**Law reviews.** — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 230 (1997).

## JUDICIAL DECISIONS

**Supervision of prisoners discretionary function.** — The supervision of a prisoner work detail is a discretionary function by virtue of which the supervisor is entitled to official immunity. *Parrish v. State*, 270 Ga. 878, 514 S.E.2d 834 (1999),

reversing *Simmons v. Coweta County*, 229 Ga. App. 550, 494 S.E.2d 362 (1997).

**Cited in** *Williams v. Georgia Dep’t of Cors.*, 224 Ga. App. 571, 481 S.E.2d 272 (1997).

## OPINIONS OF THE ATTORNEY GENERAL

### ANALYSIS

#### RULES GOVERNING HIRING OUT INMATES

##### 3. PRIVATE ENDEAVORS

#### Rules Governing Hiring Out Inmates

##### 3. Private Endeavors

**Solid waste management facility.** — Inmate labor may not be used to work for

a solid waste management facility that is operated by a private, for-profit entity, if the labor inures to the benefit of the entity. 1999 Op. Att’y Gen. No. 99-12.

## 42-5-63. Unauthorized possession of weapon by inmate.

(a) Every person confined in a penal institution or confined in any other facility under the jurisdiction of or subject to the authority of the board or who, while being conveyed to or from any facility, or while at any other location under such jurisdiction or authority, or while being conveyed to or from any such place, or while under the custody of officials, officers, or employees subject to such jurisdiction or authority, who, without authorization of the appropriate authorities, possesses or carries upon his person or has under his custody or control any instrument or weapon of the kind commonly known as a blackjack, slingshot, billy, sandclub, sandbag, or knuckles whether made from metal, thermoplastic, wood, or other similar material; or any pistol, revolver, or other firearm; or any explosive substance; or any dirk, dagger, switchblade, gravity knife, razor, or any other sharp instrument which is capable of such use as may endanger the safety or security of any of the facilities described in this subsection or of any person therein

shall be guilty of a felony and, upon conviction thereof, shall be punished by imprisonment for a term of not less than one nor more than five years.

(b) A person is deemed “confined in a penal institution” if he is confined in any of the penal institutions specified in subsection (a) of this Code section by order made pursuant to law, regardless of the purpose of the confinement and regardless of the validity of the order directing the confinement, until a judgment of a competent court setting aside the order becomes final so as to entitle the person to his immediate release.

(c) A person is deemed “confined in” a penal institution even if, at the time of the offense, he is temporarily outside its walls or bounds for the purpose of confinement in a local place of confinement pending trial or for any other purpose for which an inmate may be allowed temporarily outside the walls or bounds of a penal institution; but an inmate who has been released on parole is not deemed “confined in” a penal institution for purposes of this Code section. (Ga. L. 1973, p. 555, § 1; Ga. L. 1989, p. 14, § 42; Ga. L. 2008, p. 533, § 3/SB 366.)

**The 2008 amendment**, effective July 1, 2008, substituted “knuckles whether made from metal, thermoplastic, wood, or other similar material” for “metal knuckles” near the middle of subsection (a).

### RESEARCH REFERENCES

**ALR.** — What constitutes actual or constructive possession of unregistered or otherwise prohibited firearm in violation of 26 USCS § 5861, 133 ALR Fed. 347.

### 42-5-64. Educational programming.

(a) The commissioner shall maintain an educational program within the state prison system to assist inmates in achieving at least a fifth-grade level on standardized reading tests. Inmates who test below the fifth-grade level and who have been sentenced to incarceration for a period of one year or longer shall be required by institutional staff to attend appropriate classes until they attain this level or until they are released from incarceration, whichever event occurs first; provided, however, that inmates who have remained in the educational program for 90 school days may voluntarily withdraw thereafter. The commissioner or his designee shall have the discretion to exclude certain inmates from the provisions of this subsection due to the inability of such inmates to benefit from an educational program for reasons which may include: custody status, particularly of those inmates under a death sentence; mental handicap or physical illness; participation in a boot camp program; or possession of a general education diploma or high school diploma. The State Board of Pardons and Paroles shall

incorporate satisfactory participation in such an educational program into the parole guidelines adopted pursuant to Code Section 42-9-40.

(b) For the purposes of this Code section, educational programming shall not apply to inmates who:

- (1) Have been sentenced to death;
- (2) Have attained 50 years of age; or
- (3) Have serious learning disabilities.

(c) The commissioner shall provide additional educational programs in which inmates can voluntarily participate to further their education beyond the fifth-grade level.

(d) The commissioner shall utilize available services and programs within the Department of Education, and the Department of Education shall cooperate with the commissioner in the establishment of educational programs and the testing of inmates as required in this Code section.

(e) The commissioner shall be authorized to promulgate rules and regulations necessary to carry out the provisions of this Code section. (Code 1981, § 42-5-64, enacted by Ga. L. 1986, p. 1596, § 2; Ga. L. 1992, p. 3219, § 1.)

**Editor's notes.** — Ga. L. 1992, p. 3219, § 2, provides: "This Act shall become effective only when funds are specifically appropriated for purposes of this Act in an appropriations Act making specific reference to this Act. This Act shall apply to

those inmates sentenced to the Department of Corrections after its effective date." Funds were appropriated by the General Assembly at the 1993 session. This is a correction to the delayed effective date note in the bound volume.

#### **42-5-65. Victim photographs prohibited; exception.**

(a) For purposes of this Code section, the term "inmate" means any person confined in a penal institution or confined in another facility under the jurisdiction of or subject to the authority of the board or while under the custody of officials, officers, or employees under the authority of the board.

(b) An inmate who is serving a sentence for a violation of Chapter 5 of Title 16 relating to crimes against the person shall be prohibited from possessing or carrying about his or her person or maintaining in any prison cell or similar area under his or her control any photograph, picture, or similar depiction of any victim of the offense for which he or she is serving where such photograph, picture, or depiction was a part of the criminal investigation, prosecution, or evidence leading to the inmate's conviction.



(c) An inmate who is serving a sentence for a violation of Chapter 6 of Title 16 relating to sexual offenses shall be prohibited from possessing or carrying about his or her person or maintaining in any prison cell or similar area under his or her control any photograph, picture, or similar depiction of any victim of the offense for which he or she is serving.

(d) A person acting in violation of this Code section shall be guilty of a misdemeanor.

(e) This Code section shall not apply where the photograph or picture is needed for use in any civil or criminal proceeding provided that the inmate receives permission by a court having jurisdiction over the proceeding and only for so long as and in such manner as directed by court order.

(f) Nothing in this Code section shall limit further restrictions or limitations on the possession of contraband or victim photographs by persons confined or under the custody of the board as deemed appropriate by the board. (Code 1981, § 42-5-65, enacted by Ga. L. 2007, p. 169, § 1/SB 34; enacted by Ga. L. 2007, p. 224, § 2/HB 313.)

<p><b>Effective date.</b> — This Code section became effective May 18, 2007.</p> <p><b>Code Commission notes.</b> — The enactment of this Code section by Ga. L.</p>	<p>2007, p. 169, § 1, irreconcilably conflicted with and was treated as superseded by Ga. L. 2007, p. 224, § 2. See <i>County of Butts v. Strahan</i>, 151 Ga. 417 (1921).</p>
--	--

OPINIONS OF THE ATTORNEY GENERAL

<p><b>Fingerprinting of offenders not required.</b> — A violation of O.C.G.A. § 42-5-65(d) is not an offense designated</p>	<p>as one that requires fingerprinting. 2008 Op. Att’y Gen. No. 2008-1.</p>
---	---

ARTICLE 4

GRANTING SPECIAL LEAVES, EMERGENCY LEAVES, AND LIMITED LEAVE PRIVILEGES

42-5-85. Leave privileges of inmates serving murder sentences.

(a) As used in this Code section only, the term “aggravating circumstance” means that:

- (1) The murder was committed by a person with a prior record of conviction for a capital felony;
- (2) The murder was committed while the offender was engaged in the commission of another capital felony, aggravated battery, burglary in any degree, or arson in the first degree;
- (3) The offender, by his act of murder, knowingly created a great risk of death to more than one person in a public place by means of a

weapon or device which would normally be hazardous to the lives of more than one person;

(4) The offender committed the murder for himself or another, for the purpose of receiving money or any other thing of monetary value;

(5) The murder of a judicial officer, former judicial officer, district attorney or solicitor-general, or former district attorney, solicitor, or solicitor-general was committed during or because of the exercise of his or her official duties;

(6) The offender caused or directed another to commit murder or committed murder as an agent or employee of another person;

(7) The murder was outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the victim;

(8) The murder was committed against any peace officer, corrections employee, or firefighter while engaged in the performance of his official duties;

(9) The murder was committed by a person in, or who has escaped from, the lawful custody of a peace officer or place of lawful confinement; or

(10) The murder was committed for the purpose of avoiding, interfering with, or preventing a lawful arrest or custody in a place of lawful confinement of himself or another.

(b) No special leave, emergency leave, or limited leave privileges shall be granted to any inmate who is serving a murder sentence unless the commissioner has approved in writing a written finding by the department that the murder did not involve any aggravating circumstance.

(c) The department shall make a finding that a murder did not involve an aggravating circumstance only after an independent review of the record of the trial resulting in the conviction or of the facts upon which the conviction was based. (Code 1981, § 42-5-85, enacted by Ga. L. 1983, p. 1806, § 2; Ga. L. 1984, p. 22, § 42; Ga. L. 1996, p. 748, § 22; Ga. L. 2002, p. 660, § 4; Ga. L. 2002, p. 1259, § 11; Ga. L. 2012, p. 899, § 8-15/HB 1176.)

**The 2002 amendments.** — The first 2002 amendment, effective July 1, 2002, substituted “firefighter” for “fireman” in paragraph (a)(8). The second 2002 amendment, effective July 1, 2002, made identical changes.

**The 2012 amendment,** effective July 1, 2012, inserted “in any degree” in para-

graph (a)(2). See editor’s note for applicability.

**Editor’s notes.** — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: “This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before

July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of

offense, of whatever degree or level, pursuant to this Act.”

**Law reviews.** — For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012).

## ARTICLE 6

### VOLUNTARY LABOR PROGRAM

**Effective date.** — This article became effective July 1, 2005.

**Editor’s notes.** — Ga. L. 2005, p. 1222, § 1, not codified by the General Assembly, provides that: “This Act shall be known and may be cited as the ‘Working Against Recidivism Act.’”

Ga. L. 2005, p. 1222, § 2, not codified by the General Assembly, provides that: “The General Assembly finds and declares that:

“(1) Many persons sentenced to confinement for criminal offenses commit additional criminal offenses after release from confinement, and such recidivism is a serious danger to public safety and a major source of expense to the state;

“(2) Under the appropriate conditions and limitations, work programs of voluntary labor by inmates of state and county correctional institutions for privately owned profit-making employers to produce goods, services, or goods and services for sale to public or private purchasers provide substantial public benefits by:

“(A) Providing job experience and skills to participating inmates;

“(B) Allowing participating inmates to accumulate savings available for their use when released from the correctional institution;

“(C) Lowering recidivism rates;

“(D) Generating taxes from inmate income;

“(E) Reducing the cost of incarceration by enabling participating inmates to pay room and board; and

“(F) Providing participating inmates income to pay fines, restitution, and family support;

“(3) Appropriate conditions and limitations for voluntary labor by inmates for

such work programs include but are not limited to:

“(A) Assurance that inmates’ work is voluntary;

“(B) Payment of inmates at wages at a rate not less than that paid for work of a similar nature in the locality in which the work is to be performed;

“(C) Provision of federal and state governmental benefits to participating inmates comparable to governmental benefits provided for similarly situated private sector workers;

“(D) Selection of participating inmates with careful attention to security issues;

“(E) Appropriate supervision of inmates during travel or employment outside the correctional institution;

“(F) Assurance that inmate labor will not result in the displacement of employed workers; be applied in skills, crafts, or trades in which there is a surplus of available gainful labor in the locality; or impair existing contracts for services;

“(G) Consultations with local private employers that may be economically impacted; and

“(H) Consultations with local labor union organizations and other local employee groups, especially those who have an interest in the trade or skill to be performed by the inmates; and

“(4) Requirements for the federal Prison Industry Enhancement Certification Program authorized by 18 U.S.C. Section 1761 and federal regulations are sufficient to ensure appropriate conditions and limitations in many areas of concern for programs of voluntary labor by inmates for privately owned profit-making employers to produce goods, services, or goods and services for sale to public and private purchasers.”



**42-5-120. Rules and regulations; requirements.**

(a) The board is authorized to issue and promulgate rules and regulations for programs of voluntary labor by inmates for privately owned profit-making employers to produce goods, services, or goods and services for sale to public and private purchasers. Such rules and regulations shall be designed to meet the published requirements of the Prison Industry Enhancement Certification Program authorized by 18 U.S.C. Section 1761 and federal regulations and to provide other appropriate conditions and limitations. Such rules and regulations may provide for administration and management of such work programs by the department and the Georgia Correctional Industries Administration.

(b) The rules and regulations for the work programs authorized by this article shall include but not be limited to rules requiring:

(1) Assurance that inmates' work is voluntary and that there shall be no retribution against inmates who do not volunteer;

(2) Payment of inmates at wages at a rate not less than that paid for work of a similar nature in the locality in which the work is to be performed;

(3) Provision of federal and state governmental benefits to participating inmates comparable to governmental benefits provided for similarly situated private sector employees;

(4) Selection of participating inmates with careful attention to security issues;

(5) Appropriate supervision of inmates during travel and employment outside the correctional institution;

(6) Assurance that inmate labor will not result in the displacement of employed workers; be applied in skills, crafts, or trades in which there is a surplus of available gainful labor in the locality; or impair existing contracts for services;

(7) Consultations with local private businesses that may be economically impacted;

(8) Consultations with local labor union organizations and other local employee groups, especially those who have an interest in the trade or skill to be performed by the inmates; and

(9) Procedures for deductions from inmate wages for federal, state, and local taxes; reasonable charges for room and board; court-ordered child support and voluntary family support; and payments to the Georgia Crime Victims Emergency Fund of not less than 5 percent

nor greater than 20 percent of gross wages, in compliance with Prison Industry Enhancement Certification Program requirements.

(b.1) Regulations relating to paragraphs (2) and (6) of subsection (b) of this Code section and relating to whether labor shortages exist shall be promulgated and issued jointly by the board and the Commissioner of Labor.

(c) Notwithstanding the provision of Code Section 50-13-2 exempting the Board of Corrections from the definition of the term “agency” and thus from the provisions of Chapter 13 of Title 50, the “Georgia Administrative Procedure Act,” the rules and regulations promulgated in accordance with this Code section shall be subject to the provisions of Code Section 50-13-4, relating to procedural requirements for the adoption, amendment, or repeal of rules; the limitation on an action to contest rules; and legislative override of rules to which the members of the General Assembly object. (Code 1981, § 42-5-120, enacted by Ga. L. 2005, p. 1222, § 4/HB 58; Ga. L. 2007, p. 224, § 3/HB 313.)

**The 2007 amendment**, effective May 18, 2007, added “and the Georgia Correctional Industries Administration” at the end of the last sentence of subsection (a).

#### OPINIONS OF THE ATTORNEY GENERAL

**Administration of voluntary labor programs.** — State law as of 2005 does not permit the Georgia Department of Corrections to delegate to the Georgia Correctional Industries Administration the administration and management of the voluntary inmate labor program authorized pursuant to the Working Against Recidivism Act. 2005 Op. Att’y Gen. No. 2005-5.

#### 42-5-121. Federal certification.

The commissioner shall seek certification under the federal Prison Industry Enhancement Certification Program authorized by 18 U.S.C. Section 1761 and federal regulations for programs of voluntary labor by inmates for privately owned profit-making employers to produce goods, services, or goods and services for sale to public or private purchasers. After receiving certification, the board shall operate one or more such programs. (Code 1981, § 42-5-121, enacted by Ga. L. 2005, p. 1222, § 4/HB 58.)

#### 42-5-122. Conflicting legislation preempted.

Any program for voluntary labor by inmates created in accordance with this article shall not be subject to the provisions of Code Section 42-5-60 prohibiting hiring out inmates to private persons, corporations, and businesses conducted for profit; prohibiting sale of goods, wares, or merchandise manufactured, produced, or mined by inmates to private persons, firms, associations, and corporations; and limiting the amount

of compensation for inmates. (Code 1981, § 42-5-122, enacted by Ga. L. 2005, p. 1222, § 4/HB 58.)

**42-5-123. Compensation by employers for administrative and other costs to the state.**

(a) The board shall ensure by rules or by contractual provisions that the privately owned profit-making employers compensate the department and the Georgia Correctional Industries Administration for any administrative costs or other costs incurred by the department or the administration for the operation of the program or programs. The board shall ensure by rules or by contractual provisions that the department and the administration are compensated for use of any employees of the department or the administration, use of any space owned by or under the control of the department or the administration, or use of any other resources of the department or the administration in the operation of the program or programs.

(b) Employers that participate in inmate work programs under this article shall be prohibited from providing any thing of value to the Board of Corrections, the Department of Corrections, the Georgia Correctional Industries Administration, or any officer or employee thereof other than the payments authorized by this Code section. The Board of Corrections, the Department of Corrections, the Georgia Correctional Industries Administration, and any officer or employee thereof shall be prohibited from accepting any thing of value, other than the payments authorized by this Code section, from employers that participate in inmate work programs under this article. As used in this Code section, the term "thing of value" shall have the same meaning as that term is defined in Code Section 16-10-2. (Code 1981, § 42-5-123, enacted by Ga. L. 2005, p. 1222, § 4/HB 58; Ga. L. 2007, p. 224, § 4/HB 313.)

**The 2007 amendment**, effective May 18, 2007, designated the existing provisions as subsection (a) and added subsection (b).

**42-5-124. Publicizing and inviting participation in programs; cooperation with the Department of Labor.**

Following the issuance and promulgation of rules and regulations, the department and the Georgia Correctional Industries Administration are authorized to publicize the program and invite employers to participate. The department shall rely upon the Georgia Department of Labor for determining whether inmates would be displacing other workers, whether labor shortages exist, and the prevailing local wage for work to be done by inmates. The Georgia Department of Labor is authorized to provide such determinations to the department. (Code



1981, § 42-5-124, enacted by Ga. L. 2005, p. 1222, § 4/HB 58; Ga. L. 2007, p. 224, § 5/HB 313.)

**The 2007 amendment**, effective May 18, 2007, substituted “and the Georgia Correctional Industries Administration are” for “is” near the middle of the first sentence.

**42-5-125. General applicability; exceptions.**

(a) Every program involving employment of an inmate, convict, or prisoner by a business operated for profit to manufacture, produce, or mine goods, wares, or merchandise for transportation in interstate commerce or to provide services shall become a part of the programs authorized by this article and shall conform to the rules and regulations promulgated in accordance with this article.

(b) This Code section shall not apply to programs for the production of agricultural commodities, parts for the repair of farm machinery, or goods, wares, or merchandise manufactured for use by not for profit organizations, the federal government, the District of Columbia, or by any state or political subdivision of a state.

(c) This Code section shall not apply to an inmate, convict, or prisoner serving a term of supervised release, as described in 18 U.S.C. Section 3583. (Code 1981, § 42-5-125, enacted by Ga. L. 2005, p. 1222, § 4/HB 58.)

**CHAPTER 6**

**DETAINERS**

Article 1		Sec.	
General Provisions			
Sec.			
42-6-3.	Time limit for trial; notice and request for final disposition; notification of inmate and interested parties; effect of escape by inmate.	42-6-5.	inmate pursuant to Code Section 24-13-60. Temporary custody of inmate requesting disposition of pending indictment or accusation.
<b>Article 2</b>			
<b>Interstate Agreement on Detainers</b>			
42-6-4.	Effect of failure to meet time limit for trial after delivery of	42-6-20.	Enactment and text of agreement.

## ARTICLE 1

### GENERAL PROVISIONS

#### 42-6-1. Definitions.

#### JUDICIAL DECISIONS

**Due process concerns.** — State inmate's 42 U.S.C. § 1983 suit against a county sheriff and state prison warden failed because the inmate's erroneous transfer to prison from the county jail after the inmate was granted an appeal bond in one criminal case did not preclude the inmate from being detained on a bench warrant prior to the trial of a second criminal case; such transfers did not

violate the Fourteenth Amendment's due process clause because the inmate did not present any evidence the inmate's detention at the prison was qualitatively different from the inmate's detention in the jail, and pretrial detention in a prison setting was authorized by O.C.G.A. §§ 42-6-1 to 42-6-5. *White v. Thompson*, 299 Fed. Appx. 930 (11th Cir. 2008) (Unpublished).

#### 42-6-2. When detainers to be accepted and filed by department.

#### JUDICIAL DECISIONS

**Authority.** — Defendant's motion for bond was properly denied because a purported detainer did not meet the requirements in O.C.G.A. § 42-6-2, did not constitute arrest and confinement of the defendant, did not require the present-

ment of the charges to a grand jury within 90 days, and did not entitle the defendant to automatic bail under O.C.G.A. § 17-7-50. *Denson v. State*, 317 Ga. App. 456, 731 S.E.2d 130 (2012).

#### 42-6-3. Time limit for trial; notice and request for final disposition; notification of inmate and interested parties; effect of escape by inmate.

(a) Whenever a person has entered upon a term of imprisonment in a penal institution under the jurisdiction of the department and whenever during the continuance of the term of imprisonment there is pending in any court in this state any untried indictment or accusation on the basis of which a detainer has been filed against such an inmate, he shall be brought to trial within two terms of court after he has caused to be delivered to the prosecuting officer and the clerk of the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request that a final disposition be made of the indictment or accusation; provided, however, that, for good cause shown in open court, the inmate or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the inmate shall be accompanied by a certificate of the department stating the term of commitment under which the inmate is being held, the computed

expiration date of the commitment, and the time of parole eligibility of the inmate.

(b) The written notice and request for final disposition referred to in subsection (a) of this Code section shall be given or sent by the inmate to the commissioner who shall promptly forward it, together with the certificate referred to in subsection (a) of this Code section, to the appropriate prosecuting officer and court by registered or certified mail or statutory overnight delivery.

(c) Within 15 days, the warden, superintendent, or other official having physical custody of the inmate shall inform him of the source and furnish him with a copy of the contents of any detainer filed against him and shall also inform him of his right to make a request for a final disposition of the indictment or accusation upon which the detainer is based.

(d) Any request for final disposition of a pending indictment or accusation made by an inmate pursuant to subsection (a) of this Code section shall operate as a request for final disposition of all untried indictments or accusations on the basis of which detainees have been filed against the inmate from the county to whose prosecuting official the request for a final disposition is specifically directed. The commissioner shall promptly notify all interested prosecuting officers and courts in the several jurisdictions within the county to which the inmate's request for final disposition is being sent of the proceeding being initiated by the inmate. Notification sent pursuant to this subsection shall be accompanied by copies of the inmate's written notice and request and by the certificate. If trial is not had on any indictment or accusation upon which a detainer has been based within two terms of court after the receipt by the appropriate prosecuting officers and court of the inmate's request for final disposition, provided no continuance has been granted, all detainees based upon such pending indictments or accusations shall be stricken and dismissed from the records of the department.

(e) Escape from custody by an inmate subsequent to his execution of the request for a final disposition of any pending indictment or accusation shall automatically void the request for final disposition and the same shall be stricken and dismissed from the records of the department. (Ga. L. 1968, p. 1110, § 1; Ga. L. 1982, p. 3, § 42; Ga. L. 2000, p. 1589, § 3.)

**The 2000 amendment**, effective July 1, 2000, and applicable with respect to notices delivered on or after July 1, 2000,

substituted "certified mail or statutory overnight delivery" for "certified mail" at the end of subsection (b).



## RESEARCH REFERENCES

**ALR.** — Duress, necessity, or conditions of confinement as justification for escape from prison, 54 ALR5th 141.

**42-6-4. Effect of failure to meet time limit for trial after delivery of inmate pursuant to Code Section 24-13-60.**

If an inmate is not brought to trial upon a pending indictment or accusation within two terms of court after delivery of the inmate to the sheriff or a deputy sheriff pursuant to subsection (a) of Code Section 24-13-60, provided no continuance has been granted, all detainers based upon the pending indictments or accusations shall be stricken and dismissed from the records of the department. (Ga. L. 1968, p. 1110, § 1; Ga. L. 2011, p. 99, § 62/HB 24.)

**The 2011 amendment**, effective January 1, 2013, substituted “Code Section 24-13-60” for “Code Section 24-10-60” in the middle of this Code section. See editor’s note for applicability.

**Editor’s notes.** — Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that this Act shall ap-

ply to any motion made or hearing or trial commenced on or after January 1, 2013.

**Law reviews.** — For article, “Evidence,” see 27 Ga. St. U.L. Rev. 1 (2011). For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

**42-6-5. Temporary custody of inmate requesting disposition of pending indictment or accusation.**

(a) In response to the request of an inmate for final disposition of any pending indictment or accusation made pursuant to Code Section 42-6-3 or pursuant to an order of a court entered pursuant to subsection (a) of Code Section 24-13-60, the department shall offer to deliver temporary custody of the inmate to the sheriff or a deputy sheriff of the county in which the indictment or accusation is pending against the inmate. The judge of the court in which the proceedings are pending is authorized to and shall issue an ex parte order directed to the department requiring the delivery of the inmate to the sheriff or a deputy sheriff of the county in which the trial is to be held.

(b) The sheriff or a deputy sheriff of a county accepting temporary custody of an inmate shall present proper identification and a certified copy of the indictment or accusation upon which trial is to be had.

(c) If the sheriff or deputy sheriff fails or refuses to accept temporary custody of the inmate, detainers based upon indictments or accusations upon which trial has been sought shall be stricken and dismissed from the records of the department.

(d) The temporary custody referred to in this article shall be only for the purpose of permitting prosecution on the pending indictments or

accusations which form the basis of the detainer or detainers filed against the inmate.

(e) At the earliest practicable time consonant with the purposes of this article, the inmate shall be returned by the sheriff or a deputy sheriff to the custody of the department.

(f) During the continuance of temporary custody or while the inmate is otherwise being made available for trial as required by this article, the sentence being served by the inmate shall continue to run and good time shall be earned by the inmate to the same extent that the law allows for any other inmate serving under the jurisdiction of the department.

(g) From the time that the sheriff or a deputy sheriff receives custody of an inmate pursuant to this article and until the inmate is returned to the physical custody of the department, the county to which the inmate is transported shall be responsible for the safekeeping of the inmate and shall pay all costs of transporting, caring for, keeping, and returning the inmate. Any habeas corpus action instituted by the inmate while in the custody of the sheriff shall be defended by the county attorney and the expenses of such litigation shall be paid by the county. (Ga. L. 1968, p. 1110, § 1; Ga. L. 1969, p. 606, § 1; Ga. L. 1982, p. 3, § 42; Ga. L. 2011, p. 99, § 63/HB 24.)

**The 2011 amendment**, effective January 1, 2013, substituted “Code Section 24-13-60” for “Code Section 24-10-60” in the middle of the first sentence of subsection (a). See editor’s note for applicability.

**Editor’s notes.** — Ga. L. 2011, p. 99, § 101/HB 24, not codified by the General Assembly, provides that this Act shall ap-

ply to any motion made or hearing or trial commenced on or after January 1, 2013.

**Law reviews.** — For article, “Evidence,” see 27 Ga. St. U.L. Rev. 1 (2011). For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 1 (2011).

## ARTICLE 2

### INTERSTATE AGREEMENT ON DETAINERS

#### 42-6-20. Enactment and text of agreement.

The Agreement on Detainers is enacted into law and entered into by this State with all other jurisdictions legally joining therein in the form substantially as follows:

The contracting states solemnly agree that:

#### ARTICLE I.

The party states find that charges outstanding against a prisoner, detainers based on untried indictments, informations or complaints, and difficulties in securing speedy trial of persons already incarcerated

in other jurisdictions, produce uncertainties which obstruct programs of prisoner treatment and rehabilitation. Accordingly, it is the policy of the party states and the purpose of this agreement to encourage the expeditious and orderly disposition of such charges and determination of the proper status of any and all detainees based on untried indictments, information or complaints. The party states also find that proceedings with reference to such charges and detainees, when emanating from another jurisdiction, cannot properly be had in the absence of cooperative procedures. It is the further purpose of this agreement to provide such cooperative procedures.

## ARTICLE II.

As used in this agreement:

(a) "State" shall mean a state of the United States; the United States of America; a territory or possession of the United States; the District of Columbia; the Commonwealth of Puerto Rico.

(b) "Sending state" shall mean a state in which a prisoner is incarcerated at the time that he initiates a request for final disposition pursuant to Article III hereof or at the time that a request for custody or availability is initiated pursuant to Article IV hereof.

(c) "Receiving state" shall mean the state in which trial is to be had on an indictment, information or complaint pursuant to Article III or Article IV hereof.

## ARTICLE III.

(a) Whenever a person has entered upon a term of imprisonment in a penal or correctional institution of a party state, and whenever during the continuance of the term of imprisonment there is pending in any other party state any untried indictment, information or complaint on the basis of which a detainer has been lodged against the prisoner, he shall be brought to trial within one hundred eighty days after he shall have caused to be delivered to the prosecuting officer and the appropriate court of the prosecuting officer's jurisdiction written notice of the place of his imprisonment and his request for a final disposition to be made of the indictment, information or complaint, provided that for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance. The request of the prisoner shall be accompanied by the certificate of the appropriate official having custody of the prisoner, stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner.



(b) The written notice and request for final disposition referred to in paragraph (a) hereof shall be given or sent by the prisoner to the warden, commissioner of corrections or other official having custody of him, who shall promptly forward it together with the certificate to the appropriate prosecuting official and court by registered or certified mail or statutory overnight delivery, return receipt requested.

(c) The warden, commissioner of corrections or other official having custody of the prisoner shall promptly inform him of the source and contents of any detainer lodged against him and shall also inform him of his right to make a request for final disposition of the indictment, information, or complaint on which the detainer is based.

(d) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall operate as a request for final disposition of all untried indictments, informations or complaints on the basis of which detainees have been lodged against the prisoner from the state to whose prosecuting official the request for final disposition is specifically directed. The warden, commissioner of corrections or other official having custody of the prisoner shall forthwith notify all appropriate prosecuting officers and courts in the several jurisdictions within the state to which the prisoner's request for final disposition is being sent of the proceeding being initiated by the prisoner. Any notification sent pursuant to this paragraph shall be accompanied by copies of the prisoner's written notice, request, and the certificate. If trial is not had on any indictment, information or complaint contemplated hereby prior to the return of the prisoner to the original place of imprisonment, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

(e) Any request for final disposition made by a prisoner pursuant to paragraph (a) hereof shall also be deemed to be a waiver of extradition with respect to any charge or proceeding contemplated thereby or included therein by reason of paragraph (d) hereof, and a waiver of extradition to the receiving state to serve any sentence there imposed upon him, after completion of his term of imprisonment in the sending state. The request for final disposition shall also constitute a consent by the prisoner to the production of his body in any court where his presence may be required in order to effectuate the purposes of this agreement and a further consent voluntarily to be returned to the original place of imprisonment in accordance with the provisions of this agreement. Nothing in this paragraph shall prevent the imposition of a concurrent sentence if otherwise permitted by law.

(f) Escape from custody by the prisoner subsequent to his execution of the request for final disposition referred to in paragraph (a) hereof shall void the request.

## ARTICLE IV.

(a) The appropriate officer of the jurisdiction in which an untried indictment, information or complaint is pending shall be entitled to have a prisoner against whom he has lodged a detainer and who is serving a term of imprisonment in any party state made available in accordance with Article V (a) hereof upon presentation of a written request for temporary custody or availability to the appropriate authorities of the state in which the prisoner is incarcerated: provided that the court having jurisdiction of such indictment, information or complaint shall have duly approved, recorded and transmitted the request; and provided further that there shall be a period of thirty days after receipt by the appropriate authorities before the request be honored, within which period the governor of the sending state may disapprove the request for temporary custody or availability, either upon his own motion or upon motion of the prisoner.

(b) Upon receipt of the officer's written request as provided in paragraph (a) hereof, the appropriate authorities having the prisoner in custody shall furnish the officer with a certificate stating the term of commitment under which the prisoner is being held, the time already served, the time remaining to be served on the sentence, the amount of good time earned, the time of parole eligibility of the prisoner, and any decisions of the state parole agency relating to the prisoner. Said authorities simultaneously shall furnish all other officers and appropriate courts in the receiving state who have lodged detainers against the prisoner with similar certificates and with notices informing them of the request for custody or availability and of the reasons therefor.

(c) In respect of any proceeding made possible by this Article, trial shall be commenced within one hundred twenty days of the arrival of the prisoner in the receiving state, but for good cause shown in open court, the prisoner or his counsel being present, the court having jurisdiction of the matter may grant any necessary or reasonable continuance.

(d) Nothing contained in this Article shall be construed to deprive any prisoner of any right which he may have to contest the legality of his delivery as provided in paragraph (a) hereof, but such delivery may not be opposed or denied on the ground that the executive authority of the sending state has not affirmatively consented to or ordered such delivery.

(e) If trial is not had on any indictment, information or complaint contemplated hereby prior to the prisoner's being returned to the original place of imprisonment pursuant to Article V (e) hereof, such indictment, information or complaint shall not be of any further force or effect, and the court shall enter an order dismissing the same with prejudice.

## ARTICLE V.

(a) In response to a request made under Article III or Article IV hereof, the appropriate authority in a sending state shall offer to deliver temporary custody of such prisoner to the appropriate authority in the state where such indictment, information or complaint is pending against such person in order that speedy and efficient prosecution may be had. If the request for final disposition is made by the prisoner, the offer of temporary custody shall accompany the written notice provided for in Article III of this agreement. In the case of a federal prisoner, the appropriate authority in the receiving state shall be entitled to temporary custody as provided by this agreement or to the prisoner's presence in federal custody at the place for trial, whichever custodial arrangement may be approved by the custodian.

(b) The officer or other representative of a State accepting an offer of temporary custody shall present the following upon demand:

(1) Proper identification and evidence of his authority to act for the state into whose temporary custody the prisoner is to be given;

(2) A duly certified copy of the indictment, information or complaint on the basis of which the detainer has been lodged and on the basis of which the request for temporary custody of the prisoner has been made.

(c) If the appropriate authority shall refuse or fail to accept temporary custody of said person, or in the event that an action on the indictment, information or complaint on the basis of which the detainer has been lodged is not brought to trial within the period provided in Article III or Article IV hereof, the appropriate court of the jurisdiction where the indictment, information or complaint has been pending shall enter an order dismissing the same with prejudice, and any detainer based thereon shall cease to be of any force or effect.

(d) The temporary custody referred to in this agreement shall be only for the purpose of permitting prosecution on the charge or charges contained in one or more untried indictments, informations or complaints which form the basis of the detainer or detainers or for prosecution on any other charge or charges arising out of the same transaction. Except for his attendance at court and while being transported to or from any place at which his presence may be required, the prisoner shall be held in a suitable jail or other facility regularly used for persons awaiting prosecution.

(e) At the earliest practicable time consonant with the purposes of this agreement, the prisoner shall be returned to the sending state.

(f) During the continuance of temporary custody or while the prisoner is otherwise being made available for trial as required by this



agreement, time being served on the sentence shall continue to run but good time shall be earned by the prisoner only if, and to the extent that, the law and practice of the jurisdiction which imposed the sentence may allow.

(g) For all purposes other than that for which temporary custody as provided in this agreement is exercised, the prisoner shall be deemed to remain in the custody of and subject to the jurisdiction of the sending state and any escape from temporary custody may be dealt with in the same manner as an escape from the original place of imprisonment or in any other manner permitted by law.

(h) From the time that a party state receives custody of a prisoner pursuant to this agreement until such prisoner is returned to the territory and custody of the sending state, the state in which the one or more untried indictments, informations or complaints are pending or in which trial is being had shall be responsible for the prisoner and shall also pay all costs of transporting, caring for, keeping and returning the prisoner. The provisions of this paragraph shall govern unless the states concerned shall have entered into a supplementary agreement providing for a different allocation of costs and responsibilities as between or among themselves. Nothing herein contained shall be construed to alter or affect any internal relationship among the departments, agencies and officers of and in the government of a party state, or between a party state and its subdivisions, as to the payment of costs, or responsibilities therefor.

#### ARTICLE VI.

(a) In determining the duration and expiration dates of the time periods provided in Articles III and IV of this agreement, the running of said time periods shall be tolled whenever and for as long as the prisoner is unable to stand trial, as determined by the court having jurisdiction of the matter.

(b) No provision of this agreement, and no remedy made available by this agreement, shall apply to any person who is adjudged to be mentally ill.

#### ARTICLE VII.

Each state party to this agreement shall designate an officer who, acting jointly with like officers of other party states, shall promulgate rules and regulations to carry out more effectively the terms and provisions of this agreement, and who shall provide, within and without the state, information necessary to the effective operation of this agreement.

#### ARTICLE VIII.

This agreement shall enter into full force and effect as to a party state when such state has enacted the same into law. A state party to this

agreement may withdraw herefrom by enacting a statute repealing the same. However, the withdrawal of any state shall not affect the status of any proceedings already initiated by inmates or by state officers at the time such withdrawal takes effect, nor shall it affect their rights in respect thereof.

## ARTICLE IX.

This agreement shall be liberally construed so as to effectuate its purposes. The provisions of this agreement shall be severable and if any phrase, clause, sentence or provision of this agreement is declared to be contrary to the Constitution of any party state or of the United States or the applicability thereof to any government, agency, person or circumstance is held invalid, the validity of the remainder of this agreement and the applicability thereof to any government, agency, person or circumstance shall not be affected thereby. If this agreement shall be held contrary to the Constitution of any state party hereto, the agreement shall remain in full force and effect as to the remaining states and in full force and effect as to the state affected as to all severable matters. (Ga. L. 1972, p. 938, § 1; Ga. L. 2000, p. 1589, § 3.)

**The 2000 amendment**, effective July 1, 2000, and applicable with respect to notices delivered on or after July 1, 2000,

substituted “certified mail or statutory overnight delivery” for “certified mail” in subsection (b) under Article III.

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

##### INITIATING DETAINING PROCEEDINGS

##### 1. ARTICLE III

#### General Consideration

##### Applicability.

A detainer based on an arrest warrant for pending criminal charges does not trigger the protections of the Interstate Agreement on Detainers, O.C.G.A. § 42-6-20. *State v. Carlton*, 276 Ga. 693, 583 S.E.2d 1 (2003).

**Speedy trial provisions.** — It is clear from the language of the Interstate Agreement on Detainers that its speedy trial provisions apply exclusively to untried indictments, informations, or complaints on the basis of which detainers have been lodged against the prisoner. *Morrison v. State*, 272 Ga. App. 34, 611 S.E.2d 720, aff'd, 280 Ga. 222, 626 S.E.2d 500 (2006).

#### Effect of failure to comply with article.

State violated the Interstate Agreement on Detainers by continuing to hold a defendant in Georgia following the dismissal of the terroristic threats charge specified in the detainer, but the defendant was not prejudiced by the error as the defendant could have been tried in Georgia after serving the federal sentence. *Morrison v. State*, 272 Ga. App. 34, 611 S.E.2d 720, aff'd, 280 Ga. 222, 626 S.E.2d 500 (2006).

The trial court did not err in dismissing a Columbia County indictment against the defendant, pursuant to O.C.G.A. § 42-6-20, as the state failed to bring the defendant to trial upon a return from

imprisonment in South Carolina to face charges in Lincoln County; moreover, the defendant's request for disposition of all untried indictments applied equally to Columbia County as it did to Lincoln County. *State v. Thompson*, 284 Ga. App. 744, 644 S.E.2d 889 (2007).

**Failure to comply excusable.** — Where the state showed that the reason for the delay in trying defendant was due to, *inter alia*, conflicts of previously appointed defense counsel and requests for continuance from defense counsel, the trial court did not err in denying defendant's plea in bar for failure to try defendant within 180 days pursuant to the Interstate Detainer Act, O.C.G.A. § 42-6-20, *et seq.* *King v. State*, 268 Ga. App. 811, 603 S.E.2d 88 (2004).

**Failure to comply with procedural requirements.** — Trial court properly denied the defendant's motion to dismiss the indictment with prejudice because the defendant never waived extradition for trial on the indictment or requested a final disposition of the detainer based thereon. Therefore, the defendant did not comply with the procedural requirements of the Georgia Interstate Agreement on Detainers (IAD), O.C.G.A. § 42-6-20, *et seq.*, the 180-day deadline was never triggered, and there was no violation of the

IAD. *Herbert v. State*, 288 Ga. 843, 708 S.E.2d 260 (2011).

**Jurisdiction.** — Despite the fact that drug and firearm charges filed against a detainee were not listed in the detainer, the convictions were upheld on appeal, as the Interstate Agreement on Detainers, O.C.G.A. § 42-6-20, *et seq.*, neither granted nor divested a trial court's jurisdiction; while the better practice would have been for the state to include all charges for which the detainee was prosecuted within the detainer, it did not sacrifice jurisdiction by failing to do so. *Morrison v. State*, 280 Ga. 222, 626 S.E.2d 500 (2006).

**Cited in** *Herndon v. State*, 277 Ga. App. 374, 626 S.E.2d 579 (2006).

## Initiating Detaining Proceedings

### 1. Article III

**Dismissal of charges improper.** — Because the 180-day period in the Interstate Agreement on Detainers, O.C.G.A. § 42-6-20, art. III(a), during which the defendant was required to be brought to trial, had not expired when the trial court entered the court's dismissal order, and because there was no basis for finding waiver, the trial court erred in dismissing the charges against the defendant with prejudice. *State v. McCarter*, 314 Ga. App. 542, 724 S.E.2d 843 (2012).

## RESEARCH REFERENCES

**ALR.** — Construction and application of Article IV of Interstate Agreement on Detainers (IAD): issues related to "speedy trial" requirement, and construction of essential terms, 51 ALR6th 1.

Construction and application of Article IV of Interstate Agreement on Detainers (IAD): issues related to "anti-shuttling" provision, dismissal of action against detainee, and adequacy of certificate, 52 ALR6th 1.

Construction and application of Article IV of Interstate Agreement on Detainers (IAD): issues related to custody, temporary custody, contest as to legality of custody, necessity of hearing, and transmittal orders, 53 ALR6th 1.

Construction and application of article III of Interstate Agreement on Detainers (IAD) — Issues related to "speedy trial" requirement, and construction of essential terms, 70 ALR6th 361.

Construction and application of article III of Interstate Agreement on Detainers (IAD) — Issues related to certificate, request by defendant for disposition, and "anti-shuttling" provision, 71 ALR6th 335.

Construction and application of article III of Interstate Agreement on Detainers (IAD) — Issues related to custody, duties of prison officials, waiver of extradition, escape, assistance of counsel, and necessity of hearing, 72 ALR6th 141.



**42-6-25. Escape by person in custody under agreement.****RESEARCH REFERENCES**

**ALR.** — Duress, necessity, or conditions of confinement as justification for escape from prison, 54 ALR5th 141.

**CHAPTER 7****TREATMENT OF YOUTHFUL OFFENDERS**

**Editor's notes.** — Ga. L. 1998, p. 270, § 13, not codified by the General Assembly, provides: "The General Assembly recognizes that criminal street gangs have succeeded at times in maintaining their structure, organization, and discipline in penal institutions and have continued to conduct criminal activities while incarcerated. Therefore, the General Assembly requests and encourages state and local officials with responsibility for the opera-

tion of adult and juvenile penal institutions and related facilities to develop policies and procedures which will identify members of criminal street gangs and, where necessary, to separate members and associates of the same criminal street gang in order that such gang members cannot maintain the gang's structure, organization, and discipline and will have a more difficult time in conducting criminal activities while incarcerated in this state."

**42-7-1. Short title.****JUDICIAL DECISIONS**

**Applicability.** — Georgia Youthful Offender Act of 1972, O.C.G.A. § 42-7-1 et seq., impacted a sentence and not a con-

viction. *Smith v. State*, 266 Ga. App. 111, 596 S.E.2d 230 (2004).

**RESEARCH REFERENCES**

**ALR.** — Treatment under Federal Juvenile Delinquency Act (18 USCS §§ 5031-5042) of juvenile alleged to have

violated law of United States, 137 ALR Fed 481.

**42-7-2. Definitions.****JUDICIAL DECISIONS**

**"Youthful offender."** — Defendant previously convicted of burglaries committed when defendant was 16 years of age could not have been prosecuted under the Georgia Youthful Offender Act of 1972

(Act), O.C.G.A. § 42-7-1 et seq., because that Act applied to offenders who were at least 17 years of age. *Smith v. State*, 266 Ga. App. 111, 596 S.E.2d 230 (2004).

42-7-3. Providing institutions and facilities.

RESEARCH REFERENCES

ALR. — Treatment under Federal Juvenile Delinquency Act (18 USCS §§ 5031-5042) of juvenile alleged to have violated law of United States, 137 ALR Fed 481.

42-7-4. Studies and diagnoses; placement of youthful offender by department.

RESEARCH REFERENCES

ALR. — Treatment under Federal Juvenile Delinquency Act (18 USCS §§ 5031-5042) of juvenile alleged to have violated law of United States, 137 ALR Fed 481.

CHAPTER 8

PROBATION

Article 2

State-wide Probation System

Sec.		Sec.	
		42-8-34.1.	Requirements for revocation of probated or suspended sentence; restitution or fines; limitation on probation supervision.
42-8-21.	Definitions [Repealed].	42-8-35.	Terms and conditions of probation; supervision.
42-8-22.	State-wide probation system for felony offenders created; administration generally.	42-8-35.3.	Conditions of probation for stalking or aggravated stalking.
42-8-23.	Administration of supervision of felony probationers by Department of Corrections; graduated sanctions.	42-8-35.4.	Confinement in probation detention center.
42-8-26.	Qualifications of probation supervisors; compensation and expenses; conflicts of interest; bonds.	42-8-35.6.	Family violence intervention program participation as condition of probation; cost borne by defendant.
42-8-30.1.	Applicability to counties establishing probation system pursuant to Code Section 42-8-100.	42-8-35.7.	Drug and alcohol screening of probationers.
42-8-34.	Hearings and determinations; referral of cases to probation supervisors; probation or suspension of sentence; payment of fine or costs; disposition of defendant prior to hearing; continuing jurisdiction; transfer of probation supervision; probation fee.	42-8-36.	Duty of probationer to inform probation supervisor of residence and whereabouts; violations; unpaid moneys.
		42-8-37.	Effect of termination of probated portion of sentence; review of cases of persons receiving probated sentence; reports.
		42-8-38.	Arrest or graduated sanctions

Sec.

- for probationers violating terms; hearing; disposition of charge; procedure when probation revoked in county other than that of conviction.
- 42-8-40. Confidentiality of papers; exemption from subpoena; declassification; limited use by personnel.

### Article 3

#### Probation of First Offenders

- 42-8-60. Probation prior to adjudication of guilt; violation of probation; review of criminal record by judge.
- 42-8-62. Discharge of defendant without adjudication of guilt.
- 42-8-63.1. Discharges disqualifying individuals from employment.
- 42-8-66. Applicability.

### Article 4

#### Participation of Probationers in Community Service Programs

- 42-8-72. Community service as condition of probation; determination of appropriateness of community service for particular offender; service as live-in attendant for disabled person; community service in lieu of incarceration; community service as discipline.

### Article 5

#### Pretrial Release and Diversion Programs

- 42-8-80. Establishment and operation; rules and regulations.
- 42-8-81. Release of person charged to program.

### Article 6

#### Agreements for Probation Services

- 42-8-100. Jurisdiction of probation matters in ordinance violation cases; costs; agreements between chief judges of county courts or judges of municipal

Sec.

- courts and corporations, enterprises, or agencies for probation services.
- 42-8-101. County and Municipal Probation Advisory Council.
- 42-8-102. Uniform professional standards and uniform contract standards.
- 42-8-103. Quarterly report to judge and council; records to be open for inspection.
- 42-8-104. Conflicts of interests prohibited — private entities.
- 42-8-105. Conflicts of interests prohibited — public entities and employees prohibited from engaging in certain employment, business, or other activities that interfere with duties and responsibilities under this article.
- 42-8-106. Confidentiality of records.
- 42-8-107. Registration with council.
- 42-8-108. Applicability of article to contractors for probation services; requirements for private corporations, private enterprises and private agencies entering into written contracts for services.

### Article 7

#### Ignition Interlock Devices as Probation Condition

- 42-8-110. Definitions; applicability; purchase or lease of ignition interlock devices by counties, municipalities, or private entities; costs, fees, and deposits; participation by indigents.
- 42-8-111. Court issuance of certificate for installation of ignition interlock devices; exceptions; completion of alcohol and drug use risk reduction program; notice of requirements; fees for driver's license.
- 42-8-112. Timing for issuance of ignition interlock device limited driving permit; documentation required; reporting requirement.
- 42-8-113. Renting, leasing, or lending motor vehicle to probationer



Sec.		Sec.	
	subject to this article prohibited.	42-8-152.	Sentencing options systems; retention of jurisdiction by court.
42-8-114.	Specifying provider for ignition interlock device.	42-8-153.	System of administrative sanctions.
42-8-115.	Certification of ignition interlock devices.	42-8-154.	Preliminary hearing for alleged violation of probation; exceptions to hearing requirement.
42-8-116.	Warning labels.	42-8-155.	Penalty for probation violation; hearing; waiver of hearing.
42-8-116.1.	Effect of failing to comply; previously installed devices.	42-8-156.	Finality of hearing officer's decision; review.
42-8-117.	Revocation of driving privilege upon violation of probation imposed by Code Section 42-8-111.	42-8-157.	Article not construed as repealing any court's probationary or supervisory power.
<b>Article 9</b>		42-8-158.	Applicability of article.
<b>Probation Management</b>		42-8-159.	Construction of article.
42-8-150.	Short title.		
42-8-151.	Definitions.		

## RESEARCH REFERENCES

**Am. Jur. Proof of Facts.** — Governmental Entity's Liability for Injuries Caused by Negligently Released Individual, 19 POF2d 583.

## ARTICLE 2

### STATE-WIDE PROBATION SYSTEM

#### 42-8-21. Definitions.

Reserved. Repealed by Ga. L. 2012, p. 899, § 7-6/HB 1176, effective July 1, 2012.

**Editor's notes.** — This Code section was based on Code 1981, § 42-8-21; Ga. L. 1985, p. 149, § 42; Ga. L. 1985, p. 283, § 1.

Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect

at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

**Law reviews.** — For article on the 2012 repeal of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012).

#### 42-8-22. State-wide probation system for felony offenders created; administration generally.

There is created a state-wide probation system for felony offenders to be administered by the Department of Corrections. The probation

system shall not be administered as part of the duties and activities of the State Board of Pardons and Paroles. Separate files and records shall be kept with relation to the system. (Ga. L. 1956, p. 27, § 2; Ga. L. 1958, p. 15, § 1; Ga. L. 1962, p. 16, § 1; Ga. L. 1966, p. 56, § 1; Ga. L. 1985, p. 283, § 1; Ga. L. 2000, p. 1643, § 2.)

**The 2000 amendment**, effective January 1, 2001, inserted “for felony offenders” in the first sentence.

**42-8-23. Administration of supervision of felony probationers by Department of Corrections; graduated sanctions.**

(a) As used in this Code section, the term “chief probation officer” means the highest ranking field probation officer in each judicial circuit who does not have direct supervision of the probationer who is the subject of the hearing.

(b) The department shall administer the supervision of felony probationers.

(c) If graduated sanctions have been made a condition of probation by the court and if a probationer violates the conditions of his or her probation, other than for the commission of a new offense, the department may impose graduated sanctions as an alternative to judicial modification or revocation of probation, provided that such graduated sanctions are approved by a chief probation officer.

(d) The failure of a probationer to comply with the graduated sanction or sanctions imposed by the department shall constitute a violation of probation.

(e) A probationer may at any time voluntarily accept the graduated sanctions proposed by the department.

(f)(1) The department’s decision shall be final unless the probationer files an appeal in the sentencing court. Such appeal shall be filed within 30 days of the issuance of the decision by the department.

(2) Such appeal shall first be reviewed by the judge upon the record. At the judge’s discretion, a de novo hearing may be held on the decision. The filing of the appeal shall not stay the department’s decision.

(3) When the sentencing judge does not act on the appeal within 30 days of the date of the filing of the appeal, the department’s decision shall be affirmed by operation of law.

(g) Nothing contained in this Code section shall alter the relationship between judges and probation supervisors prescribed in this article nor be construed as repealing any power given to any court of

this state to place offenders on probation or to supervise offenders. (Ga. L. 1972, p. 1069, § 14; Ga. L. 1977, p. 1209, § 2; Ga. L. 1978, p. 1647, § 3; Ga. L. 2000, p. 1643, § 2; Ga. L. 2012, p. 899, § 7-7/HB 1176.)

**The 2000 amendment**, effective January 1, 2001, inserted “felony” in the first sentence.

**The 2012 amendment**, effective July 1, 2012, substituted the present provisions of this Code section for the former provisions, which read: “The department shall administer the supervision of felony probationers. Nothing in this Code section shall alter the relationship between judges and probation supervisors prescribed in this article.” See editor’s note for applicability.

**Editor’s notes.** — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the Gen-

eral Assembly, provides: “This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act.”

**Law reviews.** — For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012).

### JUDICIAL DECISIONS

**Cited in** *Wolcott v. State*, 278 Ga. 664, 604 S.E.2d 478 (2004).

### 42-8-26. Qualifications of probation supervisors; compensation and expenses; conflicts of interest; bonds.

(a) In order for a person to hold the office of probation supervisor, he or she must be at least 21 years of age at the time of appointment and must have completed a standard two-year college course, provided that any person who is employed as a probation supervisor on or before July 1, 1972, shall not be required to meet the educational requirements specified in this Code section, nor shall he or she be prejudiced in any way for not possessing the requirements. The qualifications provided in this Code section are the minimum qualifications and the department is authorized to prescribe such additional and higher educational qualifications from time to time as it deems desirable, but not to exceed a four-year standard college course.

(b) The compensation of the probation supervisors shall be set pursuant to the rules of the State Personnel Board. Probation supervisors shall also be allowed travel and other expenses as are other state employees.

(c)(1) No supervisor shall engage in any other employment, business, or activities which interfere or conflict with his or her duties and responsibilities as probation supervisor.

(2) No supervisor shall own, operate, have any financial interest in, be an instructor at, or be employed by any private entity which



provides drug or alcohol education services or offers a DUI Alcohol or Drug Use Risk Reduction Program certified by the Department of Driver Services.

(3) No supervisor shall specify, directly or indirectly, a particular DUI Alcohol or Drug Use Risk Reduction Program which a probationer may or shall attend. This paragraph shall not prohibit any supervisor from furnishing any probationer, upon request, the names of certified DUI Alcohol or Drug Use Risk Reduction Programs. Any supervisor violating this paragraph shall be guilty of a misdemeanor.

(d) Each probation supervisor shall give bond in such amount as may be fixed by the department payable to the department for the use of the person or persons damaged by his or her misfeasance or malfeasance and conditioned on the faithful performance of his or her duties. The cost of the bond shall be paid by the department; provided, however, that the bond may be procured, either by the department or by the Department of Administrative Services, under a master policy or on a group blanket coverage basis, where only the number of positions in each judicial circuit and the amount of coverage for each position are listed in a schedule attached to the bond; and in such case each individual shall be fully bonded and bound as principal, together with the surety, by virtue of his or her holding the position or performing the duties of probation supervisor in the circuit or circuits, and his or her individual signature shall not be necessary for such bond to be valid in accordance with all the laws of this state. The bond or bonds shall be made payable to the department. (Ga. L. 1956, p. 27, § 6; Ga. L. 1958, p. 15, § 6; Ga. L. 1960, p. 1092, § 1; Ga. L. 1965, p. 413, § 2; Ga. L. 1967, p. 86, § 4; Ga. L. 1972, p. 604, § 5; Ga. L. 1991, p. 94, § 42; Ga. L. 1992, p. 3221, § 4; Ga. L. 1996, p. 1107, § 1; Ga. L. 2005, p. 334, § 24-1/HB 501; Ga. L. 2009, p. 745, § 2/SB 97; Ga. L. 2012, p. 446, § 2-63/HB 642.)

**The 2005 amendment**, effective July 1, 2005, substituted “Department of Driver Services” for “Department of Human Resources” in paragraph (c)(2).

**The 2009 amendment**, effective July 1, 2009, substituted “State Personnel Administration” for “State Merit System of Personnel Administration” in the first sentence of subsection (b).

**The 2012 amendment**, effective July 1, 2012, inserted “or she” twice in the first sentence of subsection (a); substituted “set pursuant to the rules of the State Personnel Board” for “set by the State Personnel Board and the State Personnel Administration” in the first sentence of subsection

(b); and inserted “or her” throughout subsection (d).

**Editor’s notes.** — Ga. L. 2012, p. 446, § 3-1/HB 642, not codified by the General Assembly, provides that: “Personnel, equipment, and facilities that were assigned to the State Personnel Administration as of June 30, 2012, shall be transferred to the Department of Administrative Services on the effective date of this Act.” This Act became effective July 1, 2012.

Ga. L. 2012, p. 446, § 3-2/HB 642, not codified by the General Assembly, provides that: “Appropriations for functions which are transferred by this Act may be

transferred as provided in Code Section 45-12-90.”

**42-8-29. Conduct of presentence investigations and preparation of reports of findings by probation supervisors; supervision of probationers; maintenance of records relating to probationers.**

**JUDICIAL DECISIONS**

**ANALYSIS**

**GENERAL CONSIDERATION**

**General Consideration**

**Pre-sentence report not required.**

— Under O.C.G.A. § 42-8-29, the trial court was not required, but was permitted, to order the preparation of a pre-sentence investigation report prior to imposing a sentence. *Carter v. State*, 267 Ga. App. 520, 600 S.E.2d 637 (2004).

Defendant’s claim of not knowingly and

intelligently waiving the right to a pre-sentence investigation report conducted by the county probation department was without merit, because under O.C.G.A. § 42-8-29, the defendant did not have such a right. *Walker v. State*, 296 Ga. App. 763, 675 S.E.2d 496 (2009).

**Cited in** *Thompson v. State*, 276 Ga. 701, 583 S.E.2d 14 (2003).

**42-8-30. Supervision of juvenile offenders by probation supervisors.**

**JUDICIAL DECISIONS**

**Construction with other law.** — A juvenile’s interference with a juvenile probation officer’s attempt to take the juvenile into custody, after the juvenile tested positive for illegal drug use, was sufficient to support an adjudication under O.C.G.A. § 16-10-24(b); moreover, the appeals court was not persuaded by the juvenile’s

contention that O.C.G.A. § 42-8-30 specifically limited the role of the “probation supervisor” over juveniles to those counties in which no juvenile probation system existed. In *the Interest of M.M.*, 287 Ga. App. 233, 651 S.E.2d 155 (2007), cert. denied, 2008 Ga. LEXIS 95 (Ga. 2008).

**42-8-30.1. Applicability to counties establishing probation system pursuant to Code Section 42-8-100.**

In any county where the chief judge of the superior court, state court, municipal court, probate court, or magistrate court has provided for probation services for such court through agreement with a private corporation, enterprise, or agency or has established a county or municipal probation system for such court pursuant to Code Section 42-8-100, the provisions of this article relating to probation supervision services shall not apply to defendants sentenced in any such court. (Code 1981, § 42-8-30.1, enacted by Ga. L. 1991, p. 1135, § 1; Ga. L. 1993, p. 91, § 42; Ga. L. 2001, p. 813, § 1.)

The 2001 amendment, effective July 1, 2001, substituted "such court" for "either or both of such courts" in two places, substituted "chief judge of the superior court, state court, municipal court, probate court, or" for "judge of the probate court or chief magistrate of the" and inserted "or municipal".

**42-8-34. Hearings and determinations; referral of cases to probation supervisors; probation or suspension of sentence; payment of fine or costs; disposition of defendant prior to hearing; continuing jurisdiction; transfer of probation supervision; probation fee.**

(a) Any court of this state which has original jurisdiction of criminal actions, except juvenile courts, municipal courts, and probate courts, in which the defendant in a criminal case has been found guilty upon verdict or plea or has been sentenced upon a plea of nolo contendere, except for an offense punishable by death or life imprisonment, may, at a time to be determined by the court, hear and determine the question of the probation of such defendant.

(b) Prior to the hearing, the court may refer the case to the probation supervisor of the circuit in which the court is located for investigation and recommendation. The court, upon such reference, shall direct the supervisor to make an investigation and to report to the court, in writing at a specified time, upon the circumstances of the offense and the criminal record, social history, and present condition of the defendant, together with the supervisor's recommendation; and it shall be the duty of the supervisor to carry out the directive of the court.

(c) Subject to the provisions of subsection (a) of Code Section 17-10-1 and subsection (f) of Code Section 17-10-3, if it appears to the court upon a hearing of the matter that the defendant is not likely to engage in a criminal course of conduct and that the ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law, the court in its discretion shall impose sentence upon the defendant but may stay and suspend the execution of the sentence or any portion thereof or may place him on probation under the supervision and control of the probation supervisor for the duration of such probation. The period of probation or suspension shall not exceed the maximum sentence of confinement which could be imposed on the defendant.

(d)(1) In every case that a court of this state or any other state sentences a defendant to probation or any pretrial release or diversion program under the supervision of the department, in addition to any fine or order of restitution imposed by the court, there shall be imposed a probation fee as a condition of probation, release, or diversion in the amount equivalent to \$23.00 per each month under supervision, and in addition, a one-time fee of \$50.00 where such



defendant was convicted of any felony. The probation fee may be waived or amended after administrative process by the department and approval of the court, or upon determination by the court, as to the undue hardship, inability to pay, or any other extenuating factors which prohibit collection of the fee; provided, however, that the imposition of sanctions for failure to pay fees shall be within the discretion of the court through judicial process or hearings. Probation fees shall be waived on probationers incarcerated or detained in a departmental or other confinement facility which prohibits employment for wages. All probation fees collected by the department shall be paid into the general fund of the state treasury, except as provided in subsection (f) of Code Section 17-15-13, relating to sums to be paid into the Georgia Crime Victims Emergency Fund. Any fees collected by the court under this paragraph shall be remitted not later than the last day of the month after such fee is collected to the Georgia Superior Court Clerks' Cooperative Authority for deposit into the general fund of the state treasury.

(2) In addition to any other provision of law, any person convicted of a violation of Code Section 40-6-391 or subsection (b) of Code Section 16-13-2 who is sentenced to probation or a suspended sentence by a municipal, magistrate, probate, recorder's, mayor's, state, or superior court shall also be required by the court to pay a one-time fee of \$25.00. The clerk of court, or if there is no clerk the person designated to collect fines, fees, and forfeitures for such court, shall collect such fee and remit the same not later than the last day of the month after such fee is collected to the Georgia Superior Court Clerks' Cooperative Authority for deposit into the general fund of the state treasury.

(3) In addition to any fine, fee, restitution, or other amount ordered, the sentencing court may also impose as a condition of probation for felony criminal defendants sentenced to a day reporting center an additional charge, not to exceed \$10.00 per day for each day such defendant is required to report to a day reporting center; provided, however, that no fee shall be imposed or collected if the defendant is unemployed or has been found indigent by the sentencing court. The charges required by this paragraph shall be paid by the probationer directly to the department. Funds collected by the department pursuant to this subsection shall only be used by the department in the maintenance and operation of the day reporting center program.

(e) The court may, in its discretion, require the payment of a fine or costs, or both, as a condition precedent to probation.

(f) During the interval between the conviction or plea and the hearing to determine the question of probation, the court may, in its

discretion, either order the confinement of the defendant without bond or may permit his release on bond, which bond shall be conditioned on his appearance at the hearing and shall be subject to the same rules as govern appearance bonds. Any time served in confinement shall be considered a part of the sentence of the defendant.

(g) The sentencing judge shall not lose jurisdiction over any person placed on probation during the term of the person's probated sentence. The judge is empowered to revoke any or all of the probated sentence, rescind any or all of the sentence, or, in any manner deemed advisable by the judge, modify or change the probated sentence, including ordering the probationer into the sentencing options system, as provided in Article 9 of this chapter, at any time during the period of time prescribed for the probated sentence to run.

(h) Notwithstanding any provision of this Code or any rule or regulation to the contrary, if a defendant is placed on probation in a county of a judicial circuit other than the one in which he resides for committing any misdemeanor offense, such defendant may, when specifically ordered by the court, have his probation supervision transferred to the judicial circuit of the county in which he resides. (Code 1933, § 27-2702; Ga. L. 1939, p. 285, § 4; Ga. L. 1941, p. 481, § 1; Ga. L. 1950, p. 352, §§ 1, 2; Ga. L. 1956, p. 27, § 8; Ga. L. 1958, p. 15, § 8; Ga. L. 1960, p. 1148, § 1; Ga. L. 1972, p. 604, § 7; Ga. L. 1980, p. 1136, § 1; Ga. L. 1988, p. 988, § 1; Ga. L. 1989, p. 381, §§ 2, 3; Ga. L. 1992, p. 3221, § 5; Ga. L. 1993, p. 426, § 1; Ga. L. 1998, p. 840, § 2; Ga. L. 1999, p. 1271, § 1; Ga. L. 2000, p. 1643, § 2; Ga. L. 2001, p. 4, § 42; Ga. L. 2001, p. 94, § 6; Ga. L. 2004, p. 775, § 3; Ga. L. 2005, p. ES3, § 26; Ga. L. 2005, p. 60, § 42/HB 95; Ga. L. 2009, p. 124, § 1/HB 344.)

**The 1998 amendment**, effective July 1, 1998, in subsection (d), substituted "\$23.00" for "\$20.00" and added ", except as provided in subsection (f) of Code Section 17-15-13, relating to sums to be paid into the Georgia Crime Victims Emergency Fund" to the end of that subsection.

**The 1999 amendment**, effective July 1, 1999, and applicable to sentences entered on or after July 1, 1999, in subsection (d), designated the existing provisions as paragraph (1) and added the language beginning with ", and in addition," at the end of the first sentence of that paragraph, and added paragraph (2).

**The 2000 amendment**, effective January 1, 2001, in subsection (d), deleted "\$25.00 to be imposed where such defendant was convicted of a violation of Code Section 40-6-391 or subsection (b) of Code Section 16-13-2, or" following "a one-time

fee of" in the first sentence of paragraph (1), and substituted "state, or superior court" for "or state court" in the first sentence of paragraph (2).

**The 2001 amendments.** — The first 2001 amendment, effective February 12, 2001, part of an Act to revise, modernize, and correct the Code, substituted "subsection (f)" for "subsection (g)" in the first sentence in subsection (c). The second 2001 amendment, effective July 1, 2001, in subsection (g), in the first sentence, substituted "retain" for "not lose" near the beginning and deleted "during the term of his probated sentence" following "probation" at the end, and, in the second sentence, deleted "originally" preceding "prescribed" near the end.

**The 2004 amendment**, effective July 1, 2004, in subsection (g), in the first sentence, substituted "not lose" for "re-

tain” and added “during the term of the person’s probated sentence” at the end, and inserted “, including ordering the probationer into the sentencing options system, as provided in Article 9 of this chapter,” in the middle of the second sentence.

**The 2004 Extraordinary Session amendment**, effective June 15, 2004, in subsection (d), added the last sentence in paragraph (d)(1), and, in paragraph (d)(2), inserted “recorder’s, mayor’s,” in the first sentence and substituted the present provisions of the second sentence for the former second sentence, which read: “The clerk of court, or if there is no clerk the person designated to collect fines, fees, and forfeitures for such court, shall collect such fee and remit the same to the general fund of the state treasury not later than the tenth day of the month after such fee is collected and shall be subject to rule and attachment in the same manner as clerks of superior court for failure to so collect and remit.”

**The 2005 amendment**, effective April 7, 2005, part of an Act to revise, modernize, and correct the Code, revised language in paragraph (d)(1) and subsection (g).

**The 2009 amendment**, effective July 1, 2009, added paragraph (d)(3). See the Editor’s note for applicability.

**Editor’s notes.** — Ga. L. 2001, p. 94, § 1, not codified by the General Assembly, provides that: “This Act shall be known and may be cited as the ‘2001 Crime Prevention Act.’”

Ga. L. 2009, p. 124, § 2, not codified by the General Assembly, provides, in part, that the amendment to this Code section shall apply to persons convicted on or after July 1, 2009.

**Law reviews.** — For note on the 2001 amendment to O.C.G.A. § 42-8-34, see 18 Ga. St. U.L. Rev. 47 (2001).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

#### HEARING AND DETERMINATION

#### REFERRAL FOR INVESTIGATION AND RECOMMENDATION

#### PROBATION OR SUSPENSION OF SENTENCE

#### CONTINUING JURISDICTION OF SENTENCING COURT

### General Consideration

**The term “sentencing judge”** in O.C.G.A. § 42-8-34(g) refers to the office and not the person. *Smith v. State*, 250 Ga. App. 128, 550 S.E.2d 683 (2001), overruled on other grounds, *Lewis v. McDougal*, 276 Ga. 861, 583 S.E.2d 859 (2003).

#### Sentencing error.

Sentence of 10 days in jail followed by 12 months probation for conviction of driving under the influence was improper. *Kovacs v. State*, 227 Ga. App. 870, 490 S.E.2d 539 (1997).

Crime lab fee of \$25 should not have been imposed under O.C.G.A. § 42-8-34(d)(2) in the driving under the influence case under O.C.G.A. § 40-6-391 because the defendant was not sentenced to probation on the driv-

ing under the influence count. *Johnson v. State*, 282 Ga. App. 258, 638 S.E.2d 406 (2006).

**Sentencing court could consider defendant’s illegal alien status.** — Trial court did not violate defendant’s constitutional rights by considering defendant’s illegal alien status a relevant factor in formulating an appropriate sentence within the statutory range for burglary under O.C.G.A. § 16-7-1(a); the trial court properly considered that the court could not order defendant to work as a condition of probation. *Trujillo v. State*, 304 Ga. App. 849, 698 S.E.2d 350 (2010).

**Cited in** *Hermann v. State*, 249 Ga. App. 535, 548 S.E.2d 666 (2001); *Huzzie v. State*, 253 Ga. App. 225, 558 S.E.2d 767 (2002); *Allen v. State*, 286 Ga. 392, 687 S.E.2d 799 (2010).



### Hearing and Determination

#### Evidentiary hearing not available.

— Probationer was not entitled to an evidentiary hearing on a motion to modify probation. *Ardeneaux v. State*, 225 Ga. App. 461, 484 S.E.2d 74 (1997).

**A parole board may admit hearsay evidence.** — Hearsay evidence which the board admits like that which is admissible because it comes within an exception to the hearsay rule is not subject to the general principle that hearsay evidence has no probative value even if admitted without objection. *Williams v. Lawrence*, 273 Ga. 295, 540 S.E.2d 599 (2001).

### Referral for Investigation and Recommendation

#### Authority of private probation officer.

— Probation officer who was an employee of a private corporation retained to provide probation supervision services in misdemeanor cases pursuant to O.C.G.A. § 42-8-100(f)(1) was still an officer of the court and could file a petition to revoke defendant's probation on a misdemeanor shoplifting charge; probation officer's action did not constitute the practice of law let alone the unauthorized practice of law. *Huzzie v. State*, 253 Ga. App. 225, 558 S.E.2d 767 (2002).

### Probation or Suspension of Sentence

#### The benefit of the doubt should be given to the accused.

— The trial court's attempt to revoke part of defendant's probated sentence for theft was a nullity because, although an earlier court order was ambiguous about whether or not the probation provisions for both offenses had been revoked, the benefit of the doubt should be given to the accused. *Merneigh v. State*, 271 Ga. 883, 525 S.E.2d 362 (2000).

#### Duration or condition required.

— In imposing sentence of a fine to be suspended on condition that defendant not violate state law, the trial court was required to set a duration on that condition, not to exceed the maximum sentence which could be imposed for the offense. *Hirjee v. State*, 226 Ga. App. 573, 487 S.E.2d 40 (1997).

#### Prospective revocation of probation.

— Where defendant's probation was revoked before it began, defendant's probation was improperly revoked under former O.C.G.A. § 17-10-1, which was the statute in effect at the time that defendant committed the crimes that led to the revocation of probation; former O.C.G.A. § 17-10-1, which was subject to O.C.G.A. § 42-8-34(g), did not grant the authority to revoke probation before it began. *Jones v. State*, 260 Ga. App. 401, 579 S.E.2d 827 (2003).

**Trial court did not err in modifying the probationary portion of the defendant's sentence by imposing a condition banishing defendant from the subdivision in which the defendant committed burglaries** because the trial court's original sentencing order included as a special condition of probation that the defendant was to avoid all contact with the burglary victims, each of whom lived in the subdivision at issue, and to the extent that the modified sentence simply clarified the scope of that special condition, it was contemplated within the terms of the original sentence pursuant to O.C.G.A. § 42-8-34(g); the banishment provision was reasonable, narrow in scope, and included only the subdivision in which the victims resided, and in the absence of a hearing transcript or any record evidence to the contrary, the court of appeals had to presume that the trial court properly considered the evidence before it. *Tyson v. State*, 301 Ga. App. 295, 687 S.E.2d 284 (2009).

#### Sentence upon revocation of probation.

— Trial court had the authority to revoke the defendant's first offender status and enter an adjudication of guilt for the defendant's violations of probation, pursuant to O.C.G.A. §§ 42-8-34(g) and 42-8-60(b), because the defendant was still serving the defendant's probated sentence. Further, because the trial court, when pronouncing the defendant's first offender sentence, advised the defendant that, upon adjudication of guilt, the defendant could be resentenced to the statutory maximum for two counts of child molestation, and that the time served would be credited against the defendant's new sentence, the trial court was authorized to

increase the sentence originally imposed. *Kaylor v. State*, 312 Ga. App. 633, 719 S.E.2d 530 (2011).

### **Continuing Jurisdiction of Sentencing Court**

#### **Retention for entire term of probation.**

O.C.G.A. § 42-8-29 did not violate the constitutional principle of separation of powers, as a probation supervisor had a duty to make the supervisor's findings and report regarding an alleged probation revocation in writing to the court with the supervisor's recommendation; not unlike a district attorney, the probation supervisor was an employee of the Department of Corrections, within the executive branch of state government, and was charged with providing the trial court with information relevant to pending criminal proceedings over which the court alone exercised judicial authority. *Wolcott v. State*, 278 Ga. 664, 604 S.E.2d 478 (2004).

#### **Modification of conditions of probation.**

An order modifying the trial court's prior banishment order imposed as a condition of the defendant's probation was upheld on appeal, as was the denial of the defendant's motion to withdraw a negotiated plea, because: (1) the defendant's sentence was independent, and thus, not part of the negotiated plea agreement; and (2) the trial court adequately considered that the defendant's crimes were likely motivated by the relationship the defendant had with the victim, the defendant's ex-spouse, where the ex-spouse resided and worked, as well as where the ex-spouse's immediate family lived, by determining that the banishment order was issued to protect those affected, but also served a rehabilitative purpose by removing a temptation by the defendant to re-offend. *Hallford v. State*, 289 Ga. App. 350, 657 S.E.2d 10 (2008).

Trial court did not err in modifying the probationary portion of the defendant's sentence because it retained jurisdiction to modify the terms of the defendant's probation; although the trial court's order modifying the defendant's probated sentence was not entered until the subsequent term of court, the State filed its

motion to modify the sentence within the same term in which the sentence was originally rendered. *Tyson v. State*, 301 Ga. App. 295, 687 S.E.2d 284 (2009).

Defendant's double jeopardy and due process rights were not violated by the process the trial court followed in imposing certain special conditions of probation. The trial court had authority under O.C.G.A. § 42-8-34(g) to modify the probation conditions throughout the period of the sentence and the special conditions of probation did not, individually or in the aggregate, constitute additional punishment. *Stephens v. State*, 289 Ga. 758, 716 S.E.2d 154 (2011).

#### **Availability of habeas relief to probationer.**

— While a sentencing court retains jurisdiction over a defendant during any period of probation and may modify or correct the probated sentence as necessary, a writ of habeas corpus is an available avenue of relief in cases wherein a defendant not only seeks a modification of the conditions of the probation but also asserts that the sentence imposed was unconstitutional. To the extent that *Dean v. Whalen*, 234 Ga. 182 (1975), holds to the contrary, it is overruled. *Terry v. Hamrick*, 284 Ga. 24, 663 S.E.2d 256 (2008), cert. denied, 129 S. Ct. 510, 172 L.Ed.2d 375 (2008).

**Effect of other law.** — There was no modification of the defendant's probation where an original condition of probation was that he make regular reports to his probation officer as directed and where that condition was later clarified to require that he submit out-of-state travel plans to his probation officer so that the probation department could comply with an interstate compact relating to interstate travel of sex offenders. *Staley v. State*, 233 Ga. App. 597, 505 S.E.2d 491 (1998).

#### **Revocation of sentence commencing at future date.**

Following the 1992 amendments of § 17-10-1, the trial court no longer has the power to revoke a probation sentence that has not yet begun. *Lombardo v. State*, 244 Ga. App. 885, 537 S.E.2d 143 (2000).

**Modification of sentence.** — The statute does not allow a trial judge to modify a defendant's sentence after the



term of court has expired. *Levell v. State*, 247 Ga. App. 615, 544 S.E.2d 523 (2001).

**Resentencing as first offender inappropriate.** — After a defendant was convicted for statutory rape, the trial court lacked jurisdiction to resentence the defendant as a first offender or to rescind the

conviction or confinement portion of the sentence. First offender treatment was only permitted before a defendant had been adjudicated guilty and sentenced. *State v. Stulb*, 296 Ga. App. 510, 675 S.E.2d 253 (2009).

## RESEARCH REFERENCES

**ALR.** — Sufficiency of hearsay evidence in probation revocation hearings, 21 ALR6th 771.

Defendant's right to credit for time

spent in halfway house, rehabilitation center, or similar restrictive environment as condition of pretrial release, 46 ALR6th 63.

### **42-8-34.1. Requirements for revocation of probated or suspended sentence; restitution or fines; limitation on probation supervision.**

(a) For the purposes of this Code section, the term “special condition of probation or suspension of the sentence” means a condition of a probated or suspended sentence which:

(1) Is expressly imposed as part of the sentence in addition to general conditions of probation and court ordered fines and fees; and

(2) Is identified in writing in the sentence as a condition the violation of which authorizes the court to revoke the probation or suspension and require the defendant to serve up to the balance of the sentence in confinement.

(b) A court may not revoke any part of any probated or suspended sentence unless the defendant admits the violation as alleged or unless the evidence produced at the revocation hearing establishes by a preponderance of the evidence the violation or violations alleged.

(c) At any revocation hearing, upon proof that the defendant has violated any general provision of probation or suspension other than by commission of a new felony offense, the court shall consider the use of alternatives to include community service, intensive probation, diversion centers, probation detention centers, special alternative incarceration, or any other alternative to confinement deemed appropriate by the court or as provided by the state or county. In the event the court determines that the defendant does not meet the criteria for said alternatives, the court may revoke the balance of probation or not more than two years in confinement, whichever is less.

(d) If the violation of probation or suspension alleged and proven by a preponderance of the evidence or the defendant's admission is the commission of a felony offense, the court may revoke no more than the lesser of the balance of probation or the maximum time of the sentence



authorized to be imposed for the felony offense constituting the violation of the probation. For purposes of this Code section, the term “felony offense” means:

- (1) A felony offense;
  - (2) A misdemeanor offense committed in another state on or after July 1, 2010, the elements of which are proven by a preponderance of evidence showing that such offense would constitute a felony if the act had been committed in this state; or
  - (3) A misdemeanor offense committed in another state on or after July 1, 2010, that is admitted to by the defendant who also admits that such offense would be a felony if the act had been committed in this state.
- (e) If the violation of probation or suspension alleged and proven by a preponderance of the evidence or the defendant’s admission is the violation of a special condition of probation or suspension of the sentence, the court may revoke the probation or suspension of the sentence and require the defendant to serve the balance or portion of the balance of the original sentence in confinement.
- (f) The payment of restitution or reparation, costs, or fines ordered by the court may be payable in one lump sum or in periodic payments, as determined by the court after consideration of all the facts and circumstances of the case and of the defendant’s ability to pay. Such payments shall, in the discretion of the sentencing judge, be made either to the clerk of the sentencing court or, if the sentencing court is a probate court, state court, or superior court, to the probation office serving said court.
- (g) In no event shall an offender be supervised on probation for more than a total of two years for any one offense or series of offenses arising out of the same transaction, whether before or after confinement, except as provided by paragraph (2) of subsection (a) of Code Section 17-10-1. (Code 1981, § 42-8-34.1, enacted by Ga. L. 1988, p. 1911, § 1; Ga. L. 1989, p. 855, § 1; Ga. L. 1992, p. 3221, § 6; Ga. L. 2001, p. 94, § 7; Ga. L. 2010, p. 318, § 1/HB 329.)

**The 2001 amendment**, effective July 1, 2001, added subsection (a); redesignated former subsections (a) through (c) as present subsections (b) through (d), respectively; in subsection (b), substituted “A court may not” for “Notwithstanding any other provision of law, no court may” at the beginning of the subsection; in subsection (c), inserted “general” near the beginning of the first sentence; in subsection (d), deleted “or the violation of a

special condition imposed pursuant to this Code section, notwithstanding any other provision of law” following “felony offense”; added subsection (e); and redesignated former subsections (d) and (e) as present subsections (f) and (g), respectively.

**The 2010 amendment**, effective July 1, 2010, in subsection (d), in the introductory language, substituted “felony offense” for “crime” near the end of the first sen-

tence, added the second sentence, and added paragraphs (d)(1) through (d)(3).

**Editor's notes.** — Ga. L. 2001, p. 94, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the '2001 Crime Prevention Act.'"

## JUDICIAL DECISIONS

**Fourth Amendment not violated.** — Police were not acting in bad faith or in an arbitrary and capricious manner when the police searched the defendant's home since the defendant waived Fourth Amendment rights for probation and the police had a reasonable suspicion that there were drugs present. *Reece v. State*, 257 Ga. App. 137, 570 S.E.2d 424 (2002).

**Failure to warn of consequences for violations.** — Sentencing court's failure to warn a defendant, in writing, as to the consequences of violation of the terms of probation was not substantial compliance with O.C.G.A. § 42-8-34.1(a)(2). *Harvey v. Meadows*, 280 Ga. 166, 626 S.E.2d 92 (2006).

Because the relevant sentencing documents failed to state that a probationer's failure to complete a diversion center program would result in the court revoking probation and requiring the probationer to serve the balance of the original sentence in prison, and the original sentencing form did not comply with O.C.G.A. § 42-8-34.1, the trial court erred in revoking the remainder of the probationer's probation term; moreover, despite the state's contention that the probationer waived any issue regarding the wording of the sentence by consenting to the consent order, there was no basis found in the record for the appeals court to find such. *Gamble v. State*, 290 Ga. App. 37, 658 S.E.2d 785 (2008).

Trial court erred in revoking the defendant's probation under O.C.G.A. § 42-8-34.1 because the original sentencing form did not adequately warn the defendant in writing of the consequences of violating a special condition; thus, the defendant was entitled to resentencing. *Sheppard v. State*, 319 Ga. App. 813, 738 S.E.2d 662 (2013).

**Amended statute governed revocation.** — O.C.G.A. § 42-8-34.1 governs the

**Law reviews.** — For annual survey of criminal law, see 58 Mercer L. Rev. 83 (2006).

For note on the 2001 amendment to O.C.G.A. § 42-8-34.1, see 18 Ga. St. U.L. Rev. 47 (2001).

requirements for revocation of a probated sentence, and specifically repealed, without a savings clause, the prior statutory provision and all conflicting laws; the amended provision precluded the trial court from considering the prior, unamended statute during a revocation hearing, as the court was bound by the revocation requirements in effect at the time defendant's probation was revoked, not at the time defendant was sentenced to probation. *Gardner v. State*, 259 Ga. App. 375, 577 S.E.2d 69 (2003).

Trial court properly revoked a probationer's term of probation, pursuant to O.C.G.A. § 42-8-34.1 as amended, requiring the probationer to serve the full balance of the remaining sentence, as the probationer failed to report to a probation supervisor as directed in the probation order and any violation of the special conditions could result in the revocation of the entire balance of probation and require the probationer to serve up to the balance of the sentence in confinement. *Hill v. State*, 270 Ga. App. 114, 605 S.E.2d 831 (2004).

**Evidence required for revocation of probation.** — Habeas court utilized the incorrect standard, as a conviction was not necessary for a revocation of more than two years of probation; all that was required by former O.C.G.A. § 42-8-34.1(d) was that the felony upon which the revocation of probation was based be proved by a preponderance of the evidence, or by defendant's admission of its commission. *Lewis v. Sims*, 277 Ga. 240, 587 S.E.2d 646 (2003).

Revocation of defendant's probation based on theft by receiving was clearly erroneous as a stolen vehicle was seen at defendant's home and later found in a yard next door to defendant's home, but there was no evidence that defendant was



ever in possession or control of the vehicle, which was a necessary element of theft by receiving. *Gonzales v. State*, 276 Ga. App. 11, 622 S.E.2d 401 (2005).

Trial court abused its discretion in revoking the defendant's probation based upon incompetent and insufficient evidence; the only evidence that a crime was committed was an officer's hearsay testimony that the officer was told that an air compressor was stolen and that testimony was offered only to show the officer's reasons for conducting an investigation. *Smith v. State*, 283 Ga. App. 317, 641 S.E.2d 296 (2007).

**Revocation based on unpaid fine erroneous.** — Trial court erred in revoking the defendant's probation based, in part, upon the court's finding that the defendant violated the condition of probation that required the defendant to pay a fine because the record did not reflect that on or before the date of the revocation order that any balance was due. *Orr v. State*, 318 Ga. App. 77, 733 S.E.2d 378 (2012).

Because the revocation petition did not specify which Code section the defendant was alleged to have violated for the drug-related objects offense and instead simply accused the defendant of possessing certain specified drug-related objects, the only violation alleged and proven fell under O.C.G.A. § 16-13-32.2, a misdemeanor; therefore, the trial court was not authorized to revoke more than two years of the defendant's outstanding probation. *Henley v. State*, 317 Ga. App. 776, 732 S.E.2d 836 (2012).

**Probation revocation's two-year limitation.**

Revocation of the balance of four and one-half years of defendant's probation based on the commission of two new violent misdemeanors was error because, when the sole basis for revoking probation is the commission of a new misdemeanor, whether violent or not, the cap is two years. *Lawrence v. State*, 228 Ga. App. 745, 492 S.E.2d 727 (1997).

O.C.G.A. § 42-8-34.1(c) placed a two-year limitation on the period of confinement which may be ordered when probation was revoked because of a violation of a general provision of probation; a trial

court's revocation order, which could possibly have been construed as ordering more than two years in confinement, was improper. *Jordan v. State*, 279 Ga. App. 399, 635 S.E.2d 163 (2006).

Probation conditions violated by a defendant were not special conditions under O.C.G.A. § 42-8-34.1 because they were not imposed in addition to general conditions and court-ordered fines and fees; thus, the trial court was not authorized to revoke the balance of the defendant's probation and to require the defendant to serve more than two years in confinement. *Chester v. State*, 287 Ga. App. 70, 651 S.E.2d 360 (2007).

When nothing in the record showed that the trial court considered alternatives to confinement, it erred in ordering a defendant who had violated probation to serve more than two years in confinement. *Chester v. State*, 287 Ga. App. 70, 651 S.E.2d 360 (2007).

Trial court erred in ordering a probationer to serve three years because the sentence was a term of confinement greater than that specified in O.C.G.A. § 42-8-34.1(c). *Klicka v. State*, 315 Ga. App. 635, 727 S.E.2d 248 (2012).

**Two-year limitation did not apply.** — Trial court did not err in revoking defendant's probation and requiring defendant to serve five years in a probation detention center as the use of the probation detention center was an appropriate alternative; pursuant to O.C.G.A. § 42-8-34.1(c), the two-year maximum for confinement in jail did not apply. *Syms v. State*, 257 Ga. App. 521, 571 S.E.2d 514 (2002).

**Limits on years of probation revoked.** — Under O.C.G.A. § 42-8-34.1(d) and (e), violation of a special condition of probation can result in revocation of more than two years of probation; violation of a general condition of probation authorizes the revocation of no more than two years of probation. *Gardner v. State*, 259 Ga. App. 375, 577 S.E.2d 69 (2003).

Under O.C.G.A. § 42-8-34.1(d), a trial court was authorized to revoke no more than the lesser of the balance of probation or the maximum time of sentence authorized for the crime constituting a violation of the defendant's probation; since the



maximum sentence for the crime constituting a violation of the defendant's probation, felony obstruction, was five years, the trial court erred in revoking over eight years of probation. *Gibson v. State*, 279 Ga. App. 838, 632 S.E.2d 740 (2006).

A trial court properly revoked defendant's probation as a result of finding by a preponderance of the evidence that defendant engaged in a conspiracy to commit a forgery by buying a roll of holograph-imprinted laminate from an inmate to make fraudulent driver's licenses; but the trial court erred in revoking seven instead of just five years of defendant's probation because, pursuant to O.C.G.A. § 42-8-34.1(d), the maximum sentence authorized was the lesser of the balance of probation or the maximum time of the sentence authorized to be imposed for the crime constituting the violation of the probation. Since conspiracy to commit first degree forgery was punishable by no more than five years imprisonment, and defendant had seven years of probation left, only five years should have been revoked. *Walker v. State*, 289 Ga. App. 879, 658 S.E.2d 375 (2008).

**Failure to pay fines and fees.** — Trial court committed reversible error in revoking the defendant's probation for failure to pay court-ordered fines and fees because the trial court made the court's determination without making the findings the United States Supreme Court required in revocation proceedings for failure to pay a fine or restitution, but rather, the trial court inquired only as to the defendant's fitness to work before deciding to revoke the defendant's probation; in order to revoke the defendant's probation based solely on the failure to pay those costs, the trial court was required to make a finding as to the defendant's wilfulness, and if the court concluded that the defendant was not at fault, the trial court was required to consider other punishment alternatives, which the court did not do. *Johnson v. State*, 307 Ga. App. 570, 707 S.E.2d 373 (2011).

**Violation of special condition.**

Trial court's reliance on O.C.G.A. § 42-8-34.1(c) to revoke four years of defendant's probation was appropriate; violation of any new special condition im-

posed in a previous revocation proceeding or any original condition reimposed therein was deemed to be a violation of a special condition imposed pursuant to the statute. *Bryant v. State*, 251 Ga. App. 108, 553 S.E.2d 629 (2001).

O.C.G.A. § 42-8-34.1(c) authorizes the revocation of the entirety of a probated sentence in those limited instances when the probationer has a prior revocation based on the violation of a special condition or when the special condition violated by the probationer consists of the failure to make court-ordered payments of restitution, reparation, costs or fines. *Chatman v. Findley*, 274 Ga. 54, 548 S.E.2d 5 (2001), superseded by statute as stated in *Williams v. Ayers*, 276 Ga. 130, 577 S.E.2d 767 (2003).

Since the conditions of defendant's probation did not include payment of restitution, costs, or fines, and were imposed by the original sentencing court, the balance of the probation was erroneously revoked under former O.C.G.A. § 42-8-34.1(c). *Williams v. Ayers*, 276 Ga. 130, 577 S.E.2d 767 (2003) (decided prior to deletion of phrase "imposed pursuant to this Code section").

Under O.C.G.A. § 42-8-34.1, a probated sentence cannot be revoked for more than two years unless the basis for revocation is either a new felony offense or a violation of a special condition of probation. Special condition of probation means a condition of a probated or suspended sentence which: (1) is expressly imposed as part of the sentence in addition to general conditions of probation and court ordered fines and fees; and (2) is identified in writing in the sentence as a condition the violation of which authorizes the court to revoke the probation or suspension and requires the defendant to serve up to the balance of the sentence in confinement. *Gardner v. State*, 259 Ga. App. 375, 577 S.E.2d 69 (2003).

Defendant's original sentence for child molestation contained a virtually verbatim reproduction of the language required by O.C.G.A. § 42-8-34.1 to create a special condition of probation (that the defendant not associate with minors), and a modification order entered after the defendant's first probation violation did not suggest that the warnings contained in the origi-

nal sentence were no longer applicable. Therefore, when the defendant violated the special condition of probation a second time, the sentencing court was justified under § 42-8-34.1 in requiring the defendant to serve the balance of the sentence in prison. *Jowers v. Washington*, 284 Ga. 478, 668 S.E.2d 703 (2008).

Trial court did not err in revoking probated sentence because the evidence was sufficient to convict the probationer of making a terroristic threat pursuant to O.C.G.A. § 16-11-37(a) in violation of his probation, and it was more than sufficient to justify the revocation of a portion of his probated sentence; the probationer's statement that he would shoot his wife in the head with his pistol would be sufficient to show that the probationer threatened his wife with a crime of violence with the purpose of terrorizing her, and the wife's testimony was corroborated despite the fact that she was the only one who heard the threats and despite the fact that she minimized their significance in her testimony. *Geter v. State*, 300 Ga. App. 396, 685 S.E.2d 342 (2009).

Sufficient evidence supported revocation of defendant's probation, which was imposed after a conviction for child molestation, because the defendant possessed a sexually explicit video and the defendant was in a relationship with a woman, who had a minor child, in violation of two of the special conditions of his probation. *Veats v. State*, 300 Ga. App. 600, 685 S.E.2d 416 (2009).

**Sufficient evidence.** — Evidence was sufficient to show that defendant violated the terms of defendant's probation because at the probation revocation hearing, defendant admitted that defendant smoked marijuana while on probation and that defendant failed to pay the fines associated with the original conviction for the sale of cocaine. *Simpson v. State*, 252 Ga. App. 1, 555 S.E.2d 247 (2001).

Evidence was sufficient to support the trial court's decision to revoke defendant's probation, as a preponderance of the evidence showed that defendant was in violation of defendant's restitution obligation since defendant admitted that defendant was in arrears on that obligation, and that defendant committed a second violation of

defendant's probation by committing criminal acts on another person after the victim testified that defendant struck the victim in the head and was among a group of men who beat and robbed the victim. *Cannon v. State*, 260 Ga. App. 15, 579 S.E.2d 60 (2003).

Evidence was sufficient to support revocation of the second defendant's probation as the state only had to prove by a preponderance of the evidence that the second defendant violated the terms of the second defendant's probation and the state proved that by showing that the second defendant possessed cocaine and by showing that the second defendant associated with disreputable characters, which it proved by establishing that the second defendant admitted the second defendant had associated with the first defendant. *Dugger v. State*, 260 Ga. App. 843, 581 S.E.2d 655 (2003).

Trial court may revoke a probated sentence when the preponderance of the evidence shows that the defendant has committed the alleged violation of probation pursuant to O.C.G.A. § 42-8-34.1(a); thus, since the defendant's voluntary handwriting sample was properly admitted, the trial court did not consider an unreliable photo identification, and an expert was properly qualified, the evidence was sufficient to revoke the defendant's probation. *Poole v. State*, 270 Ga. App. 432, 606 S.E.2d 878 (2004).

Inadequacy of a probation revocation petition was not necessarily a basis for setting aside a revocation order if the factual grounds were established at the hearing; thus, a one-month variance between the date alleged in the petition and that proved at the hearing was not fatal. *Wolcott v. State*, 278 Ga. 664, 604 S.E.2d 478 (2004).

Trial court was authorized to find, under the preponderance of the evidence standard, that defendant's presence on private property caused a justifiable and reasonable alarm for the safety of the property, and the revocation of the defendant's probation was proper for the offense of criminal trespass and loitering or prowling where the record showed that the defendant climbed through a hole in a fence around private property at a time



when the business was closed and the gate shut, where a manager called police, and where, when the defendant was told that police had been summoned, defendant left the scene; there was no evidence that defendant's economic status or homelessness factored into the trial court's decision to revoke defendant's probation. *Milanovich v. State*, 278 Ga. App. 669, 629 S.E.2d 556 (2006).

Because the evidence showed that the probationer had continuous access to the firearms in the house on the day of a fatal shooting, and that the probationer intended to, and did in fact exercise control over the sons' access to one of the guns in the minutes leading up to the shooting, the trial court properly found that the probationer had constructive possession of the firearm. *Wright v. State*, 279 Ga. App. 299, 630 S.E.2d 774 (2006).

Although the evidence that the probationer made the probationer's arrest warrant unavailable to the officers was circumstantial, it was sufficient to authorize the trial court's finding, by a preponderance of the evidence, that the probationer obstructed the officers. *Carlson v. State*, 280 Ga. App. 595, 634 S.E.2d 410 (2006), cert. denied, No. S06C2099, 2007 Ga. LEXIS 215 (Ga. 2007).

Because the trial court did not err in: (1) admitting evidence of field tests done on the suspected methamphetamine found in a probationer's residence; (2) holding that the methamphetamine residue in a tin found in the probationer's dresser drawer supported a conclusion that the probationer's possession of the methamphetamine amounted to a violation of probation; and (3) admitting evidence showing the basis of the arrest warrant, despite a claim that the probationer was found to have not participated in a conspiracy to traffic methamphetamine, an order revoking the probationer's probation term was upheld. *Giang v. State*, 285 Ga. App. 491, 646 S.E.2d 710 (2007).

Because sufficient evidence showed that probationer approached a minor girl and offered that girl candy and admitted having incidental contact with minors, when these actions were explicitly prohibited as a condition of the probationer's probation, once the probationer reported this contact and the victim of that contact corroborated

the report, the court did not abuse the court's discretion in revoking the probationer's probation term. *Mullens v. State*, 289 Ga. App. 872, 658 S.E.2d 421 (2008).

Trial court did not err in revoking probation on the ground that the probationer committed the felony offense of possession of cocaine with intent to distribute because it was within the court's discretion to find that a sufficient foundation had been laid to allow an officer to state the officer's opinion that the substance found in the car in which the probationer was riding was cocaine when the officer testified that the officer had been a member of the narcotics investigation unit for five years, that the officer had received training in the visual identification of cocaine, and that the officer had personally worked over 200 cases where the officer had seized suspected cocaine, which subsequently tested positive for cocaine; the trial court did not manifestly abuse the court's discretion when the court found by a preponderance of the evidence that the substance was cocaine and that the probationer had constructive possession of the cocaine because in addition to the officer's opinion on the identity of the substance, the record contained other circumstantial evidence indicating that the substance was cocaine, and the driver of the car denied that the cocaine was the driver's and stated that the cocaine was thrown to the floorboard under the driver's feet by the probationer. *Thurmond v. State*, 304 Ga. App. 587, 696 S.E.2d 516 (2010).

Defendant's application for discretionary appeal was improvidently granted, and the defendant's appeal was dismissed because, pursuant to O.C.G.A. § 42-8-34.1(b), the evidence was sufficient to show that the defendant violated the terms of the defendant's probation when marijuana and an open container of alcohol were found on the floorboard of a vehicle at the defendant's feet, and the defendant resisted arrest. *Killian v. State*, 315 Ga. App. 731, 728 S.E.2d 258 (2012).

#### **Violation not established by preponderance of the evidence.**

Evidence presented during hearing held to determine if defendant's probation



should be revoked did not show that defendant did not intend to fulfill the terms of defendant's agreement to locate a car for a buyer, or that defendant had a fraudulent intent when defendant wrote a post-dated check that was dishonored when the buyer presented it for payment; the appellate court reversed the trial court's judgment finding that defendant committed theft by deception and revoking defendant's probation. *Young v. State*, 265 Ga. App. 425, 594 S.E.2d 667 (2004).

Because the evidence was insufficient, under a preponderance of the evidence standard, to find that defendant committed the offense of burglary, O.C.G.A. § 16-7-1, the trial court manifestly abused its discretion by revoking the probation. *Parker v. State*, 275 Ga. App. 35, 619 S.E.2d 750 (2005).

That a defendant's criminal conviction for trafficking in cocaine was reversed on appeal did not mean that revoking the defendant's probation on the basis of the same trafficking offense was automatically error; the criminal prosecution and the revocation proceeding were separate matters. The validity of the probation revocation was reviewed only in light of the evidence adduced at the revocation hearing. Defendant's probation was improperly revoked because the defendant's alleged trafficking in cocaine had not been established by a preponderance of the evidence as required by O.C.G.A. § 42-8-34.1(b). An informant's hearsay statements were not competent to show the defendant arranged a drug sale and no evidence connected the defendant with cocaine found in a house. *Brown v. State*, 294 Ga. App. 1, 668 S.E.2d 490 (2008).

Evidence did not support the revocation of the defendant's probation pursuant to O.C.G.A. § 42-8-34.1(b) where, after objections to hearsay evidence were sustained, the evidence did not support a finding that the defendant sold cocaine and marijuana; the only admissible evidence showed that the defendant took something out of a pocket and gave it to two men in exchange for money, and then the two men were taken into custody and found to have cocaine and marijuana in their possession. *Wright v. State*, 297 Ga. App. 813, 678 S.E.2d 506 (2009).

Trial court erred in finding that the defendant violated the defendant's probation by committing the new felony of possessing a controlled substance, piperazine or TFMPP, in violation of O.C.G.A. § 16-13-30 because the circumstantial evidence was insufficient to show the defendant's constructive possession of the TFMPP pills; the only evidence linking the defendant to the drugs was spatial proximity, but it was at least equally likely that the pills belonged to the driver of the truck where the pills were found. *Scott v. State*, 305 Ga. App. 596, 699 S.E.2d 894 (2010).

Trial court erred in revoking the defendant's probation because the evidence was insufficient to support the court's finding that the defendant committed the new offense of possession of less than one ounce of marijuana since the state presented no evidence other than the defendant's mere spatial proximity to the marijuana to support a finding that the defendant had the intent to exercise dominion and control over the marijuana. *Smith v. State*, 306 Ga. App. 54, 701 S.E.2d 490 (2010).

Trial court erred in revoking the defendant's probationary sentence because the evidence was insufficient to find that the defendant violated the condition of probation that the defendant have no contact with the victim; no evidence was presented suggesting that the defendant authored untrue statements about the victim, which were posted on several websites, in order to get in touch with or communicate with the victim. *Marks v. State*, 306 Ga. App. 824, 703 S.E.2d 379 (2010).

Trial court erred in revoking the defendant's probation on the ground that the defendant violated a condition of the probation by possessing a firearm because the state did not carry the state's burden of showing that the defendant was in possession of the rifle found leaning against the front porch of the defendant's trailer since the probation officer acknowledged that the rifle could have belonged to any one of the defendant's neighbors; there must be something more than mere spatial proximity that links the probationer to the prohibited item. *Boatner v.*

State, 312 Ga. App. 147, 717 S.E.2d 727 (2011).

Trial court erred in revoking the defendant's probation on the ground that the defendant violated a condition of the probation because the evidence was insufficient to support a finding that the defendant possessed a stun gun and other items found in a truck the defendant had been seen driving; the truck belonged to the defendant's brother-in-law, and there was no evidence that the defendant owned the truck, had exclusive control over the truck, or drove the truck prior to the discovery of the stun gun. *Boatner v. State*, 312 Ga. App. 147, 717 S.E.2d 727 (2011).

Trial court manifestly abused the court's discretion by granting the state's petition to revoke probation because the evidence was insufficient to support a finding that the probationer possessed marijuana with intent to distribute; the state showed only that the probationer was at the open front door of a trailer and that a sandwich bag of marijuana was found in a closed container inside a closet in a bedroom, but the evidence showed that other individuals had access to the trailer, including a man who sold drugs to a confidential informant. *Gray v. State*, 313 Ga. App. 470, 722 S.E.2d 98 (2011).

Trial court erred in revoking probation pursuant to O.C.G.A. § 42-8-34.1 on the ground that the probationer committed an aggravated assault in violation of O.C.G.A. § 16-5-21 because there was insufficient evidence that the probationer committed an aggravated assault offense; there was no evidence supporting an aggravated assault based on an alleged victim's apprehension of injury because even assuming that the probationer's collision with another vehicle while evading an officer was the basis for the aggravated assault charge, there was no evidence as to the occupant's apprehension of receiving an injury or as to his or her conduct showing the injury. *Klicka v. State*, 315 Ga. App. 635, 727 S.E.2d 248 (2012).

Revocation of probation was reversed because the circumstantial evidence was insufficient to show the defendant's constructive possession of the contraband found. Defendant neither owned nor

leased any portion of the property and there was no evidence that the defendant lived on or controlled any of the premises. *White v. State*, 318 Ga. App. 581, 734 S.E.2d 421 (2012).

**Failure of state to prove reliability of drug test.** — Revocation of probation based on defendant's failure of a drug test was error where the test result lacked probative value since no expert testimony was offered by the state to prove the scientific reliability of the ontrack system as used for the purpose of drug detection. *Bowen v. State*, 242 Ga. App. 631, 531 S.E.2d 104 (2000).

On appeal from an order revoking a probationer's probation, the trial court erred by admitting the results of a Roche "OnTrack TesTstik" without a showing that the test had reached a scientific state of verifiable certainty, which would allow admission of the test's results in the absence of expert testimony; on remand, the court was directed to determine whether it would have revoked the balance of the probation term based upon the probationer's failure to comply with the special condition of restitution standing alone, or impose a lesser penalty instead. *Mann v. State*, 285 Ga. App. 39, 645 S.E.2d 573 (2007).

**Leaving treatment program and failing to report to probation officer did not constitute felony escape.** — For purposes of probation revocation, a defendant had not committed a new felony offense, escape under O.C.G.A. § 16-10-52, by leaving a drug and alcohol treatment program and by failing to report to a probation officer; the defendant was not then in lawful custody or in a residential facility operated by the Georgia department of corrections. *Chester v. State*, 287 Ga. App. 70, 651 S.E.2d 360 (2007).

**Probationer dismissed from drug treatment program insufficient grounds for revocation.** — Trial court manifestly abused the court's discretion by granting the state's petition to revoke probation because the evidence was insufficient to find that the probationer's discharge from a day center program was the result of any voluntary or willful conduct on the probationer's part; the probation-



er's own actions did not cause the probationer to be dismissed from the drug treatment program. *Gray v. State*, 313 Ga. App. 470, 722 S.E.2d 98 (2011).

**Probation detention center not "prison."** — Defendant's confinement in a probation detention center was not equivalent to confinement in prison for purposes of O.C.G.A. § 42-1-12(g) because under O.C.G.A. § 42-8-34.1(c), such centers were alternatives to confinement in prison, and therefore the 10-year waiting period for release from sex offender registration requirements did not begin running upon the defendant's release from the center, but from the date the defendant was released from probation. In re *White*, 306 Ga. App. 365, 702 S.E.2d 694 (2010).

**Issue of improper revocation of probation cognizable on habeas corpus.** — Claim that a probation was improperly revoked due to lack of substantial compliance with O.C.G.A. § 42-8-34.1 regarding the conditions imposed on the probation was a cognizable issue for purposes of a habeas corpus proceeding under O.C.G.A. § 9-14-42(a), as confinement under a sentence that was longer than that permitted by state law invoked a constitutional right. *Harvey v. Meadows*, 280 Ga. 166, 626 S.E.2d 92 (2006).

**Ex post facto inquiry.** — To determine if an ex post facto violation resulted from use of the applied law in a probation revocation matter, the law in effect at the time of the probation revocation must be measured against the law in effect at the time of the initial offense, not the law in effect at the time of the act that resulted in probation revocation. *Walker v. Brown*, 281 Ga. 468, 639 S.E.2d 470 (2007).

**No ex post facto violation.** — Use of the amended version of O.C.G.A. § 42-8-34.1 when an appellant's probation was revoked due, in part, to the appellant's failure to abide by a special condition of the probation, did not implicate ex post facto concerns inasmuch as the imposition of a probated sentence is within the discretion of the sentencing court, and the appellant did not have a substantial right to receive probation, much less to receive probation that could not be revoked in its entirety upon viola-

tion of a special condition of probation. *Walker v. Brown*, 281 Ga. 468, 639 S.E.2d 470 (2007).

**No separation of powers violation.** — The trial court's order revoking a probationer's probation did not violate the separation of powers doctrine under Ga. Const. 1983, Art. I, Sec. II, Para. III, as the probationer's release resulted from an administrative error, and there was no evidence of any executive department finding that the probationer had fully served an imposed sentence in confinement based on a good-time allowance or otherwise. *Clark v. State*, 287 Ga. App. 176, 651 S.E.2d 106 (2007).

**No due process violation.** — The notice given to a defendant that the defendant violated probation by committing robbery was sufficient notice that the defendant violated probation by committing the lesser included offense of theft by taking based on the same facts; under these circumstances, the defendant could not reasonably contend for due process purposes that the defendant was not aware of the grounds on which revocation was sought or that the defendant's ability to prepare a defense was compromised. *Franklin v. State*, 286 Ga. App. 288, 648 S.E.2d 746 (2007).

**Revocation order was an abuse of trial court's discretion.** — Trial court abused the court's discretion by revoking a defendant's probation because the state failed to prove that the conduct that formed the basis of the court's revocation order was expressly forbidden by any terms of the work-release program. Specifically, the allegation that the defendant "violated a court ordered work release program" was insufficient to satisfy due process, and the state failed to offer any evidence that the defendant was informed of the rules of the work-release program. *Legere v. State*, 299 Ga. App. 640, 683 S.E.2d 155 (2009).

**Probation revocation did not increase sentence.** — As plaintiff had already served two years of plaintiff's probation, the motion to amend the probated sentence, which admittedly had a clerical error, prepared by defendant probation officer did not serve as an amendment to the length of the sentence imposed on the



plaintiff. The grant of the order had the effect of revoking the probation provisions contained in the original sentence and requiring that the remainder of the sentence be served in confinement, but it could not, and did not, increase the length of the sentence. *Morgan v. Yarbrough*, No. 7:07-cv-45 (HL), 2008 U.S. Dist. LEXIS 35269 (M.D. Ga. Apr. 30, 2008).

**Revocation proper.** — Two years of a probated sentence were properly revoked because the trial court did not err in allowing a probationer's spouse to testify without informing the spouse of the marital privilege pursuant to former O.C.G.A. §§ 24-9-21 and 24-9-23 (see now O.C.G.A. §§ 24-5-501 and 24-5-503) because the spouse was aware of the privilege but never asserted the privilege to the trial court, and it was assumed that the spouse waived the right not to testify. *Geter v. State*, 300 Ga. App. 396, 685 S.E.2d 342 (2009).

**Remand for clarification of probation revocation.** — In an action to revoke probation, remand was necessary because the written revocation orders stated that the trial court found that the defendant violated the conditions of probation by an unauthorized change of residence and failure to report to the defendant's probation officer as directed, reasons not charged in the state's petition and the appellate court could not ascertain the true basis for the revocation. *Dillard v. State*, 319 Ga. App. 299, 735 S.E.2d 297 (2012).

**Revocation was proper but credit for time served was still due to defendant.** — Trial court did not abuse the court's discretion by revoking the defendant's probation because the ambiguity in the form of the sentencing document was not fatal to the court's revocation since the defendant violated a rule prescribed by the court in failing to complete the drug treatment program the defendant had already begun; however, the trial court

erred by failing to credit the defendant for 14 days for time served as outlined in the defendant's sentence when the court revoked the defendant's probation. *Floyd v. State*, 317 Ga. App. 619, 732 S.E.2d 527 (2012).

**Impossibility for completion of special probationary condition.** — Trial court erred in revoking the defendant's probationary sentence because insufficient evidence supported the court's finding that the defendant violated the terms of the defendant's probation by failing to attend a domestic violence intervention program; the sentence did not require the defendant to complete the domestic violence intervention program by any specific date, and no evidence was presented that it was even possible for the defendant to have completed such a program during the approximately three months that the defendant served on probation prior to being arrested for violating the terms of the defendant's probationary sentence. *Marks v. State*, 306 Ga. App. 824, 703 S.E.2d 379 (2010).

**No date for completion of community service.** — Insufficient evidence supported the trial court's findings that the defendant violated the terms of the defendant's probation by failing to complete any of the defendant's community service requirement because no evidence was presented that the defendant was ever directed to begin the defendant's community service on any specific date or at all. *Marks v. State*, 306 Ga. App. 824, 703 S.E.2d 379 (2010).

**Cited in** *Ardeneaux v. State*, 225 Ga. App. 461, 484 S.E.2d 74 (1997); *Kitchens v. State*, 234 Ga. App. 785, 508 S.E.2d 176 (1998); *Solomon v. State*, 237 Ga. App. 655, 516 S.E.2d 376 (1999); *Couch v. State*, 246 Ga. App. 106, 539 S.E.2d 609 (2000); *United States v. Ayala-Gomez*, 255 F.3d 1314 (11th Cir. 2001); *Griffin v. State*, 254 Ga. App. 848, 563 S.E.2d 916 (2002); *O'Neal v. State*, 304 Ga. App. 548, 696 S.E.2d 490 (2010).

## OPINIONS OF THE ATTORNEY GENERAL

**Confinement of misdemeanants.** — While misdemeanants may only be referred to probation centers upon initial sentencing pursuant to § 42-8-35.4, they

may also be referred to such facilities pursuant to probation revocation proceedings under this section and after a probation revocation proceeding pursuant to

§ 17-10-1(a)(3)(A). 1999 Op. Att'y Gen.  
No. 99-14.

### RESEARCH REFERENCES

**ALR.** — Right and sufficiency of allocation in probation revocation proceeding, 70 ALR5th 533.

### 42-8-35. Terms and conditions of probation; supervision.

(a) The court shall determine the terms and conditions of probation and may provide that the probationer shall:

- (1) Avoid injurious and vicious habits;
- (2) Avoid persons or places of disreputable or harmful character;
- (3) Report to the probation supervisor as directed;

(4) Permit the supervisor to visit the probationer at the probationer's home or elsewhere;

(5) Work faithfully at suitable employment insofar as may be possible;

(6) Remain within a specified location; provided, however, that the court shall not banish a probationer to any area within the state:

(A) That does not consist of at least one entire judicial circuit as described by Code Section 15-6-1; or

(B) In which any service or program in which the probationer must participate as a condition of probation is not available;

(7) Make reparation or restitution to any aggrieved person for the damage or loss caused by the probationer's offense, in an amount to be determined by the court. Unless otherwise provided by law, no reparation or restitution to any aggrieved person for the damage or loss caused by the probationer's offense shall be made if the amount is in dispute unless the same has been adjudicated;

(8) Make reparation or restitution as reimbursement to a municipality or county for the payment for medical care furnished the person while incarcerated pursuant to the provisions of Article 3 of Chapter 4 of this title. No reparation or restitution to a local governmental unit for the provision of medical care shall be made if the amount is in dispute unless the same has been adjudicated;

(9) Repay the costs incurred by any municipality or county for wrongful actions by an inmate covered under the provisions of paragraph (1) of subsection (a) of Code Section 42-4-71;

(10) Support the probationer's legal dependents to the best of the probationer's ability;

(11) Violate no local, state, or federal laws and be of general good behavior;

(12) If permitted to move or travel to another state, agree to waive extradition from any jurisdiction where the probationer may be found and not contest any effort by any jurisdiction to return the probationer to this state;

(13) Submit to evaluations and testing relating to rehabilitation and participate in and successfully complete rehabilitative programming as directed by the department;

(14) Wear a device capable of tracking the location of the probationer by means including electronic surveillance or global positioning satellite systems. The department shall assess and collect fees from the probationer for such monitoring at levels set by regulation by the department;

(15) Complete a residential or nonresidential program for substance abuse or mental health treatment as indicated by a risk and needs assessment;

(16) Agree to the imposition of graduated sanctions when, in the discretion of the probation supervisor, the probationer's behavior warrants a graduated sanction; and

(17) Pay for the cost of drug screening. The Department of Corrections shall assess and collect fees from the probationer for such screening at levels set by regulation of the Department of Corrections.

(b) In determining the terms and conditions of probation for a probationer who has been convicted of a criminal offense against a victim who is a minor or dangerous sexual offense as those terms are defined in Code Section 42-1-12, the court may provide that the probationer shall be:

(1) Prohibited from entering or remaining present at a victim's school, place of employment, place of residence, or other specified place at times when a victim is present or from loitering in areas where minors congregate, child care facilities, churches, or schools as those terms are defined in Code Section 42-1-12;

(2) Required, either in person or through remote monitoring, to allow viewing and recording of the probationer's incoming and outgoing e-mail, history of websites visited and content accessed, and other Internet based communication;



(3) Required to have periodic unannounced inspections of the contents of the probationer's computer or any other device with Internet access, including the retrieval and copying of all data from the computer or device and any internal or external storage or portable media and the removal of such information, computer, device, or medium; and

(4) Prohibited from seeking election to a local board of education.

(c) The supervision provided for under subsection (b) of this Code section shall be conducted by a probation officer, law enforcement officer, or computer information technology specialist working under the supervision of a probation officer or law enforcement agency. (Ga. L. 1956, p. 27, § 10; Ga. L. 1958, p. 15, § 11A; Ga. L. 1965, p. 413, § 3; Ga. L. 1992, p. 2125, § 4; Ga. L. 1992, p. 2942, § 2; Ga. L. 2004, p. 761, § 3; Ga. L. 2004, p. 775, § 4; Ga. L. 2006, p. 379, § 25/HB 1059; Ga. L. 2006, p. 425, § 1/HB 692; Ga. L. 2008, p. 810, § 5/SB 474; Ga. L. 2012, p. 899, § 7-8/HB 1176; Ga. L. 2013, p. 222, § 18/HB 349.)

**The 2004 amendments.** — The first 2004 amendment, effective January 1, 2005, designated the existing provisions as subsection (a); throughout subsection (a), substituted “the probationer” for “him” and substituted “the probationer’s” for “his”; and added subsection (b). The second 2004 amendment, effective July 1, 2004, deleted “and” from the end of paragraph (11), substituted “; and” for a period at the end of paragraph (12), and added paragraph (13).

**The 2006 amendments.** — The first 2006 amendment effective July 1, 2006, substituted “or dangerous sexual offense as those terms are defined in” for “as that phrase is defined in subparagraph (a)(4)(B) of” in the introductory language of subsection (b); in paragraph (b)(1), substituted “loitering” for “entering or remaining present”, inserted “churches,” and substituted “Code Section 42-1-12;” for “subsection (a) of Code Section 42-1-13;” in paragraph (2), substituted “The department” for “Unless the probationer is indigent, the department” at the beginning of the second sentence; and in paragraph (3), substituted “local board of education” for “Local Board of Education”. The second 2006 amendment, effective April 27, 2006, added the proviso at the end of paragraph (a)(6), and added subparagraphs (a)(6)(A) and (a)(6)(B).

**The 2008 amendment,** effective July

1, 2008, in paragraph (b)(2), deleted “and” from the end; added paragraphs (b)(3) and (b)(4); redesignated former paragraph (b)(3) as present paragraph (b)(5); and added subsection (c).

**The 2012 amendment,** effective July 1, 2012, in subsection (a), deleted “and” at the end of paragraph (a)(12), substituted a semicolon for a period at the end of paragraph (a)(13), and added paragraphs (a)(14) through (a)(16); and, in subsection (b), deleted former paragraph (b)(2), which read: “Required to wear a device capable of tracking the location of the probationer by means including electronic surveillance or global positioning systems. The department shall assess and collect fees from the probationer for such monitoring at levels set by regulation by the department;”, redesignated former paragraphs (b)(3) through (b)(5) as present paragraphs (b)(2) through (b)(4), respectively, and inserted a comma following “Internet access” in paragraph (b)(3). See editor’s note for applicability.

**The 2013 amendment,** effective July 1, 2013, deleted “and” at the end of paragraph (a)(15); substituted “; and” for a period at the end of paragraph (a)(16); and added paragraph (a)(17). See editor’s note for applicability.

**Editor’s notes.** — Ga. L. 2004, p. 761, § 1, not codified by the General Assembly, provides that: “The General Assembly

finds that the safety of the public is a paramount concern and that prison and jail overcrowding and the high cost of incarceration demand a cost effective and innovative approach to protecting communities from dangerous offenders while at the same time providing alternatives to, or bridges to and from incarceration. Under appropriate conditions and limitations, electronic monitoring devices provide the criminal justice system with a tool that should be considered under proper circumstances. Electronic monitoring devices offer effective means to track individuals and may reduce criminal recidivism as well as provide the state with monetary savings since the cost of an electronic monitoring device is far less than the cost of incarcerating an individual and an individual may be able to pay for the device. The criminal penalties provided by this Act are designed to encourage the use of electronic monitoring devices while at the same time discourage interference with these devices.”

Ga. L. 2006, p. 379, § 30, not codified by the General Assembly, provides, in part, that: “The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment.”

Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: “This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act.”

Ga. L. 2013, p. 222, § 21/HB 349, not codified by the General Assembly, provides: “This Act shall become effective on July 1, 2013, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2013, shall be governed by the statute in effect at the time of such offense.”

**Law reviews.** — For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 11 (2006). For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012).

For note, “‘158-County Banishment’ in Georgia: Constitutional Implications under the State Constitution and the Federal Right to Travel,” see 36 Ga. L. Rev. 1083 (2002). For note on the 2002 enactment of this section, see 19 Ga. St. U.L. Rev. 142 (2002).

## JUDICIAL DECISIONS

### ANALYSIS

#### GENERAL CONSIDERATION

#### PROBATION TERMS AND CONDITIONS

1. IN GENERAL
3. CONFINEMENT TO SPECIFIED LOCATION
4. REPARATION OR RESTITUTION

#### General Consideration

**Warrantless searches vs. warrantless arrests.** — Trial court erred in denying a probationer’s motion to suppress the evidence seized from the probationer’s apartment as, even though the entry into the apartment for the purpose of effecting an arrest of the probationer was permissible, most of the evidence was seized without a warrant after the probationer

was not found in the apartment and had to be excluded under the Fourth Amendment as the search conducted was only permissible insofar as it involved the observation of items of obvious evidentiary value in plain view during the time and activities required to attempt the probationer’s arrest. The probationer was never placed on notice that the probationer was going to be subjected to warrantless



searches, and the state failed to demonstrate any exigent circumstances justifying the warrantless search. *Jones v. State*, 282 Ga. 784, 653 S.E.2d 456 (2007).

**Cited** in *Anderson v. State*, 226 Ga. App. 286, 486 S.E.2d 410 (1997); *Staley v. State*, 233 Ga. App. 597, 505 S.E.2d 491 (1998); *Sanchez v. State*, 234 Ga. App. 809, 508 S.E.2d 185 (1998).

## Probation Terms and Conditions

### 1. In General

#### Authority of court to set terms and conditions.

Absent inclusion of a record and an express authority to the contrary, the trial judge was authorized to impose attendance at the Chatham County DUI court treatment program as a condition of the defendant's probation; further, said imposition was not a denial of the defendant's equal protection rights in that nonresidents were not required to attend, especially and in light of the fact that the defendant failed to show any evidence to show the genesis, nature, or content of the program of which the defendant complained. *Kellam v. State*, 271 Ga. App. 125, 608 S.E.2d 729 (2004).

While the Court of Appeals grieved with defendant that the cited probation conditions were peculiar to a DUI conviction, because defendant failed to cite any authority showing that a court abused its discretion in imposing them upon a probated sentence for serious injury by vehicle, where DUI was the predicate offense, and defendant failed to show that any such condition was unreasonable or failed to serve the main goals of probation, the appeals court saw no reason why the cited conditions could not be imposed upon a probated sentence for serious injury by vehicle. *Hannah v. State*, 280 Ga. App. 230, 633 S.E.2d 800 (2006).

In overruling the defendant's objection to the probation imposed, the trial court erroneously deferred to the probation department in stating that any invalid conditions could be removed by the probation department; the appeals court disapproved of such a practice, as O.C.G.A. § 42-8-35(a) provided that only the court

was to determine the terms and conditions of probation. *Grovenstein v. State*, 282 Ga. App. 109, 637 S.E.2d 821 (2006).

Special probation conditions, requiring that the defendant complete a driving under the influence risk reduction course under O.C.G.A. § 40-6-391(c), perform 40 hours of community service under O.C.G.A. § 40-6-391(c), and pay a \$25 photograph fee under O.C.G.A. § 40-6-391(j)(1), (2), were not an abuse of discretion despite the fact that the conditions of probation were not imposed upon the defendant's driving under the influence conviction, for which probation was not imposed, but were instead imposed on the defendant's sentence of probation on the related convictions; while the defendant claimed that the conditions were peculiar to a driving under the influence conviction, the conditions were reasonably related to the nature of the offenses and the rehabilitative goals of probation pursuant to O.C.G.A. § 42-8-35. *Johnson v. State*, 282 Ga. App. 258, 638 S.E.2d 406 (2006).

**Suspension of defendant's hunting and fishing privileges** during the probation period imposed upon conviction of a violation of § 27-3-9, unlawful enticement of game, was not an abuse of discretion. *Quintrell v. State*, 231 Ga. App. 268, 499 S.E.2d 117 (1998).

**Condition requiring child support payments.** — A condition requiring that the probationer make child support payments directly to his ex-wife was not unreasonable and served a legitimate purpose. *Darby v. State*, 230 Ga. App. 32, 495 S.E.2d 146 (1998).

**Condition requiring curfew.** — Probation condition stating that "Defendant will submit a schedule of weekly activities to the probation officer and will be subject to curfews at the officer's discretion" was not improper. *Tyler v. State*, 279 Ga. App. 809, 632 S.E.2d 716 (2006), cert. denied, 2006 Ga. LEXIS 810 (Ga. 2006); overruled on other grounds, *Schofield v. Holsey*, 281 Ga. 809, 642 S.E.2d 56 (2007).

**Danger to probationer.** — The court would reverse a sentence which required the defendant, as a condition of probation, to wear a placard stating "BEWARE HIGH CRIME AREA" for a certain number of hours while walking through the



area where he committed his offense since the sign itself indicated that the defendant would be patrolling in a high crime area and, therefore, this would result in his being placed in danger. *Williams v. State*, 234 Ga. App. 37, 505 S.E.2d 816 (1998).

**Condition for sex offenders imposed.** — Trial court was authorized to conclude that the defendant's conduct of secretly videotaping the defendant's stepdaughter while she was in the nude was by its nature a sexual offense against a minor or criminal sexual conduct toward a minor. The court therefore did not err in exercising the court's broad discretion to impose upon the defendant special conditions of probation for sex offenders. *Price v. State*, 320 Ga. App. 85, 738 S.E.2d 289 (2013).

### 3. Confinement to Specified Location

#### Banishment.

Habeas court properly denied defendant's petition for habeas relief based on the contention that a condition of probation banishing the defendant from every county in the State of Georgia but one was unconstitutional as the defendant failed to show that the probation condition to remain in Toombs County only was unreasonable or otherwise failed to bear a logical relationship to the rehabilitative scheme of the sentence pronounced. The Supreme Court of Georgia noted that the banishment was justified to protect the victim, the defendant's ex-spouse, from the defendant's propensity for violence toward the victim. *Terry v. Hamrick*, 284 Ga. 24, 663 S.E.2d 256 (2008), cert. de-

nied, 129 S. Ct. 510, 172 L.Ed.2d 375 (2008).

Trial court did not err in modifying the probationary portion of the defendant's sentence by imposing a condition banishing him from the subdivision in which he committed burglaries because the trial court's original sentencing order included as a special condition of probation that the defendant was to avoid all contact with the burglary victims, each of whom lived in the subdivision at issue, and to the extent that the modified sentence simply clarified the scope of that special condition, it was contemplated within the terms of the original sentence pursuant to O.C.G.A. § 42-8-34(g); the banishment provision was reasonable, narrow in scope, and included only the subdivision in which the victims resided, and in the absence of a hearing transcript or any record evidence to the contrary, the court of appeals had to presume that the trial court properly considered the evidence before it. *Tyson v. State*, 301 Ga. App. 295, 687 S.E.2d 284 (2009).

### 4. Reparation or Restitution

**Reimbursement of costs of representation.** — The Georgia Indigent Defense Act, in replacing former O.C.G.A. § 17-12-10(c), did not preclude a trial court from ordering restitution of attorney fees as part of its general power to impose reasonable conditions of probation under O.C.G.A. § 42-8-35; thus, a defendant was properly ordered to reimburse the costs of the defendant's legal representation, and that aspect of the defendant's sentence was not a nullity. *State v. Pless*, 282 Ga. 58, 646 S.E.2d 202 (2007).

## RESEARCH REFERENCES

**ALR.** — The propriety of conditioning parole on defendant's not entering specified geographical area, 54 ALR5th 743.

Propriety of probation condition exposing defendant to public shame or ridicule, 65 ALR5th 187.

Propriety of requirement, as condition of probation, that defendant refrain from use of intoxicants, 46 ALR6th 241.

## 42-8-35.2. Special term of probation; when imposed; revocation; suspension.

### JUDICIAL DECISIONS

**Special probation properly imposed.** — The plain language of O.C.G.A. § 42-8-35.2(a) requires that a term of special probation be served “in addition to any term of imprisonment” rendered under O.C.G.A. § 16-13-30(d); thus, the two statutes do not conflict. Accordingly, a defendant was properly sentenced to a

ten-year incarceration followed by special probation, and the defendant’s claim that O.C.G.A. § 42-8-32.5 was implicitly repealed by the 1996 amendment to O.C.G.A. § 16-13-30 was without merit. *Mike v. State*, 290 Ga. App. 214, 659 S.E.2d 664 (2008).

## 42-8-35.3. Conditions of probation for stalking or aggravated stalking.

Notwithstanding any other terms or conditions of probation which may be imposed, a court sentencing a defendant to probation for a violation of Code Section 16-5-90 or 16-5-91 may impose one or more of the following conditions on such probation:

(1) Prohibit the defendant from engaging in conduct in violation of Code Section 16-5-90 or 16-5-91;

(2) Require the defendant to undergo a mental health evaluation and, if it is determined by the court from the results of such evaluation that the defendant is in need of treatment or counseling, require the defendant to undergo mental health treatment or counseling by a court approved mental health professional, mental health facility, or facility of the Department of Behavioral Health and Developmental Disabilities. Unless the defendant is indigent, the cost of any such treatment shall be borne by the defendant; or

(3) Prohibit the defendant from entering or remaining present at the victim’s school, place of employment, or other specified places at times when the victim is present. (Code 1981, § 42-8-35.3, enacted by Ga. L. 1993, p. 1534, § 4; Ga. L. 2009, p. 453, § 3-2/HB 228.)

**The 2009 amendment**, effective July 1, 2009, substituted “Department of Behavioral Health and Developmental Dis-

abilities” for “Department of Human Resources” at the end of the first sentence of paragraph (2).

## 42-8-35.4. Confinement in probation detention center.

(a) In addition to any other terms and conditions of probation provided for in this article, the trial judge may require that a defendant convicted of a felony and sentenced to a period of not less than one year on probation or a defendant who has been previously sentenced to probation for a forcible misdemeanor as defined in paragraph (7) of

Code Section 16-1-3 or a misdemeanor of a high and aggravated nature and has violated probation or other probation alternatives and is subsequently sentenced to a period of not less than one year on probation shall complete satisfactorily, as a condition of that probation, a program of confinement, not to exceed 180 days, in a probation detention center. Probationers so sentenced shall be required to serve the period of confinement, not to exceed 180 days, specified in the court order.

(b) The court shall determine that the defendant is at least 17 years of age at the time of sentencing.

(c) During the period of confinement, the department may transfer the probationer to other facilities in order to provide needed physical and mental health care or for other reasons essential to the care and supervision of the probationer or as necessary for the effective administration and management of its facilities. (Code 1981, § 42-8-35.4, enacted by Ga. L. 1995, p. 627, § 1; Ga. L. 2009, p. 99, § 1/HB 226; Ga. L. 2012, p. 899, § 7-9/HB 1176.)

**The 2009 amendment**, effective July 1, 2009, in the last sentence of subsection (a), substituted “the period” for “a period”, deleted “as” preceding “specified”, and deleted “, which confinement period shall be computed from the date of initial confinement in the probation detention center” following “court order” at the end. See the Editor’s note for applicability.

**The 2012 amendment**, effective July 1, 2012, in subsection (a), inserted “, not to exceed 180 days,” in the first and second sentences and substituted “shall be required” for “will be required” in the second sentence. See editor’s note for applicability.

**Editor’s notes.** — Ga. L. 2009, p. 99, § 2, not codified by the General Assembly, provides, in part, that the amendment of

this Code section shall apply to probationers sentenced on or after July 1, 2009.

Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: “This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act.”

**Law reviews.** — For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012).

## JUDICIAL DECISIONS

**Confinement of misdemeanants.** — Defendant was not eligible under O.C.G.A. § 17-10-3 for state probation detention center sentencing for misdemeanor battery since defendant did not fit into one of the narrow categories set forth in O.C.G.A. § 42-8-35.4. *Anderson v. State*, 261 Ga. App. 716, 583 S.E.2d 549 (2003).

**Sentence authorized.** — As O.C.G.A.

§ 42-8-35.4 allowed a court to order the confinement of a defendant in a probation detention center if the defendant was convicted of a felony and sentenced to a period of at least one year on probation. Defendant’s sentence met these statutory requirements. *Johnson v. State*, 283 Ga. App. 425, 641 S.E.2d 655 (2007).

**Construction with O.C.G.A. § 17-10-1.** — Reading O.C.G.A. §§ 17-10-1(a)(3)(A)



and 42-8-35.4 together, a court can confine a probation violator in a probation detention center, but not if probation is revoked for any of the reasons enumerated in O.C.G.A. § 17-10-1(a)(3)(A), and only if the defendant was put on probation previously for a forcible misdemeanor or a misdemeanor of a high and aggravated nature; a defendant who pled guilty to the misdemeanors of habitual violator, driving under the influence, possession of marijuana, and operating a vehicle without proof of insurance did not meet the criteria for confinement in a probation detention center upon revocation of probation under O.C.G.A. § 42-8-35.4, and so confinement in such a facility was unauthorized. *Wilson v. Windsor*, 280 Ga. 576, 630 S.E.2d 367 (2006).

**Transfer.** — Trial court did not err in denying a probationer's motion to modify a sentence because the probationer's claim was cognizable only in a mandamus action against the Commissioner of the Department of Corrections or in a petition for habeas corpus since the probationer's sole complaint went to the Department's decision to transfer the probationer from a probation center to a state prison under O.C.G.A. § 42-8-35.4(c), and the proba-

tioner expressly agreed as a special condition of probation that the Department could transfer the probationer to other facilities if necessary; § 42-8-35.4 does not require the Department to transfer a probationer to a probation detention center nor does it prohibit the Department from transferring a probationer to a prison. *Hillis v. State*, 303 Ga. App. 201, 692 S.E.2d 793 (2010).

**Defendant eligible to serve ordered term of confinement.** — Trial court did not err in denying the defendant's motion to correct an illegal sentence because, in accordance with the plain language of the First Offender Act, O.C.G.A. § 42-8-65(c), during the defendant's term of confinement, the defendant, who pled guilty to first degree cruelty to children, O.C.G.A. § 16-5-70, was deemed to be a convicted felon for purposes of the State-Wide Probation Act, O.C.G.A. § 42-8-35.4, and consequently, within a category of persons eligible to serve the ordered term of confinement at a probation detention center; the legislature is presumed to have had full knowledge of the First Offender Act when the legislature enacted the State-Wide Probation Act. *Mason v. State*, 310 Ga. App. 118, 712 S.E.2d 76 (2011).

## OPINIONS OF THE ATTORNEY GENERAL

**Confinement of misdemeanants.** — While misdemeanants may only be referred to probation centers upon initial sentencing pursuant to this section, they may also be referred to such facilities

pursuant to probation revocation proceedings under § 42-8-34.1 and after a probation revocation proceeding pursuant to § 17-10-1(a)(3)(A). 1999 Op. Att'y Gen. No. 99-14.

### 42-8-35.6. Family violence intervention program participation as condition of probation; cost borne by defendant.

(a) Notwithstanding any other terms or conditions of probation which may be imposed, a court sentencing a defendant to probation for an offense involving family violence as such term is defined in Code Section 19-13-10 shall require as a condition of probation that the defendant participate in a family violence intervention program certified pursuant to Article 1A of Chapter 13 of Title 19, unless the court determines and states on the record why participation in such a program is not appropriate.

(b) A court, in addition to imposing any penalty provided by law, when revoking a defendant's probation for an offense involving family

violence as defined by Code Section 19-13-10, or when imposing a protective order against family violence, shall order the defendant to participate in a family violence intervention program certified pursuant to Article 1A of Chapter 13 of Title 19, unless the court determines and states on the record why participation in such program is not appropriate.

(c) The State Board of Pardons and Paroles, for a violation of parole for an offense involving family violence as defined by Code Section 19-13-10, shall require the conditional releasee to participate in a family violence intervention program certified pursuant to Article 1A of Chapter 13 of Title 19, unless the State Board of Pardons and Paroles determines why participation in such a program is not appropriate.

(d) Unless the defendant is indigent, the cost of the family violence intervention program as provided by this Code section shall be borne by the defendant. If the defendant is indigent, then the cost of the program shall be determined by a sliding scale based upon the defendant's ability to pay. (Code 1981, § 42-8-35.6, enacted by Ga. L. 1996, p. 1113, § 2; Ga. L. 2002, p. 1435, § 6.)

**The 2002 amendment**, effective July 1, 2003, designated the existing provisions as subsection (a); in subsection (a), in the first sentence, substituted "Code Section 19-13-10 shall" for "Code Section 19-13-1 shall, to the extent that services are available," deleted "court approved" following "participate in a", and substituted "certified pursuant to Article 1A of Chapter 13 of Title 19, unless the court determines and states on the record why participation in such a program is not appropriate" for "or receive counseling related to family violence" and deleted the former second sentence which read: "Unless the defendant is indigent, the cost of

such participation in the program or counseling shall be borne by the defendant."; and added subsections (b) through (d). See Editor's notes for applicability.

**Editor's notes.** — Ga. L. 2002, p. 1435, § 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Georgia's Family Violence Intervention Program Certification Act.'"

Ga. L. 2002, p. 1435, § 7, not codified by the General Assembly, provides that the amendments to this Code section shall apply to sentences or conditional release revocations that occur on or after July 1, 2003.

## 42-8-35.7. Drug and alcohol screening of probationers.

Unless the court has ordered more frequent such screenings, it shall be the duty of each probation supervisor to administer or have administered a drug and alcohol screening not less than once every 60 days to any person who is placed on probation and who, as a condition of such probation, is required to undergo regular, random drug and alcohol screenings, provided that the drug and alcohol screenings required by this Code section shall be performed only to the extent that necessary funds therefor are appropriated in the state budget. (Code 1981, § 42-8-35.7, enacted by Ga. L. 2004, p. 775, § 5.)

**Effective date.** — This Code section became effective July 1, 2004.

**Cross references.** — Drug free workplace programs, T. 34, C. 9, A. 11.

### RESEARCH REFERENCES

**ALR.** — Propriety of requirement, as condition of probation, that defendant refrain from use of intoxicants, 46 ALR6th 241.

## **42-8-36. Duty of probationer to inform probation supervisor of residence and whereabouts; violations; unpaid moneys.**

(a)(1) It shall be the duty of a probationer, as a condition of probation, to keep his or her probation supervisor informed as to his or her residence. Upon the recommendation of the probation supervisor, the court may also require, as a condition of probation and under such terms as the court deems advisable, that the probationer keep the probation supervisor informed as to his or her whereabouts.

(2) The running of a probated sentence shall be tolled upon:

(A) The failure of a probationer to report to his or her probation supervisor as directed or failure to appear in court for a probation revocation hearing; either of such failures may be evidenced by an affidavit from the probation supervisor setting forth such failure; or

(B) The filing of a return of non est inventus or other return to a warrant, for the violation of the terms and conditions of probation, that the probationer cannot be found in the county that appears from the records of the probation supervisor to be the probationer's county of residence. Any officer authorized by law to issue or serve warrants may return the warrant for the absconded probationer showing non est inventus.

(3) The effective date of the tolling of the sentence shall be the date the court enters a tolling order and shall continue until the probationer shall personally report to the probation supervisor, is taken into custody in this state, or is otherwise available to the court.

(4) Any tolled period of time shall not be included in computing creditable time served on probation or as any part of the time that the probationer was sentenced to serve.

(b) Any unpaid fines, restitution, or any other moneys owed as a condition of probation shall be due when the probationer is arrested; but, if the entire balance of his probation is revoked, all the conditions of probation, including moneys owed, shall be negated by his imprisonment. If only part of the balance of the probation is revoked, the probationer shall still be responsible for the full amount of the unpaid fines, restitution, and other moneys upon his return to probation after release from imprisonment. (Ga. L. 1958, p. 15, § 9; Ga. L. 1982, p. 3,



§ 42; Ga. L. 1984, p. 1317, § 1; Ga. L. 1986, p. 492, § 1; Ga. L. 1987, p. 455, § 1; Ga. L. 1989, p. 452, § 1; Ga. L. 1992, p. 6, § 42; Ga. L. 2010, p. 557, § 1/HB 859.)

**The 2010 amendment**, effective July 1, 2010, rewrote subsection (a).

## JUDICIAL DECISIONS

**Probation properly withdrawn.** — Where an arrest warrant alleging probation violations was returned non est inventus, the court did not err in tolling the probated sentence and in reinstating defendant's probation, even though the state could not prove any probation violations at the revocation hearing. *Robson v. State*, 226 Ga. App. 209, 485 S.E.2d 822 (1997).

### **Tolling of a probated sentence.**

Defendant's probation was properly tolled under O.C.G.A. § 42-8-36(a)(2) after the trial court found that the probation supervisor's affidavit set forth the factual averments required by O.C.G.A. § 42-8-36(a)(2), as it informed the court that the defendant had absconded from a known residence and that the defendant's current residence was unknown, a violation of the defendant's probation conditions; thus, the trial court did not err in revoking defendant's first offender probation, adjudicating the defendant guilty, and imposing sentence on the defendant. *Vincent v. State*, 271 Ga. App. 138, 608 S.E.2d 748 (2004).

Because no language in a probation revocation affidavit indicated that the defendant had absconded and could not be found, and the warrant stated only that the defendant was in arrears in the payment of ordered restitution, a trial court erred in tolling the defendant's probation pursuant to O.C.G.A. § 42-8-36(a) and

sentencing the defendant accordingly. *Campbell v. State*, 280 Ga. App. 561, 634 S.E.2d 512 (2006).

Trial court improperly denied a defendant's motion to terminate the defendant's probation by incorrectly ruling that the probation was properly tolled based on O.C.G.A. § 42-8-36 since the state alleged that the defendant absconded and could not be found. The warrant that was returned showing that the defendant could not be found contained no oath or attestation and, therefore, failed as an affidavit, which was a requirement of § 42-8-36. *Wilson v. State*, 292 Ga. App. 540, 664 S.E.2d 890 (2008).

Trial court did not err in holding that a probationer's probated sentence was tolled, under former O.C.G.A. § 42-8-36(a)(1), because the probationer pointed to evidence in the appellate record supporting the probationer's assertions that the probationer's arrest warrant, with the signed statement by a deputy of non est inventus, was not found in the clerk's file or otherwise returned to the court. *Thompson v. State*, 313 Ga. App. 294, 721 S.E.2d 106 (2011).

**Fines.** — Because defendant's fine was not assessed as a condition of probation, but as a part of defendant's DUI sentence, the trial court did not err in denying defendant's motion to negate or suspend the fine when defendant's probation was revoked. *Rouse v. State*, 256 Ga. App. 579, 569 S.E.2d 261 (2002).

## **42-8-37. Effect of termination of probated portion of sentence; review of cases of persons receiving probated sentence; reports.**

(a) Upon the termination of the probated portion of a sentence, the probationer shall be released from probation and shall not be liable to sentence for the crime for which probation was allowed; provided,

however, that the foregoing shall not be construed to prohibit the conviction and sentencing of the probationer for the subsequent commission of the same or a similar offense or for the subsequent continuation of the offense for which he or she was previously sentenced.

(b) The court may at any time cause the probationer to appear before it to be admonished or commended and, when satisfied that its action would be for the best interests of justice and the welfare of society, may discharge the probationer from further supervision.

(c) The case of each person receiving a probated sentence of more than two years shall be reviewed by the probation supervisor responsible for that case after service of two years on probation, and a written report of the probationer's progress shall be submitted to the sentencing court along with the supervisor's recommendation as to early termination. Each such case shall be reviewed and a written report submitted annually thereafter until the termination, expiration, or other disposition of the case. (Ga. L. 1956, p. 27, § 11; Ga. L. 1972, p. 604, § 9; Ga. L. 1985, p. 516, § 1; Ga. L. 2012, p. 899, § 7-10/HB 1176.)

**The 2012 amendment**, effective July 1, 2012, in subsection (a), substituted "probated portion of a sentence" for "period of probation", inserted "that" near the middle, and inserted "or she" near the end; designated the former second sentence of subsection (a) as present subsection (b); redesignated former subsection (b) as present subsection (c), and, in subsection (c), substituted "The" for "Upon the request of the chief judge of the court from which said person was sentenced, the" in the first sentence, in the second sentence, substituted "Each" for "Upon the request of the chief judge of the court from which said person was sentenced, each", and deleted ", or more often if required," following "thereafter". See editor's note for applicability.

**Editor's notes.** — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act."

**Law reviews.** — For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012).

## JUDICIAL DECISIONS

**Formalization of "discharge" unnecessary.** — The "discharge" of a non-first-offender probationer is automatic upon the successful completion of the terms of the sentence and is not dependent upon the subsequent formalization of that successful completion. *State v. Mills*, 268 Ga. 873, 495 S.E.2d 1 (1998).

**Effect of completing first-offender**

**probationary sentence.** — Because defendant had completed a three-year first-offender probationary sentence and had been discharged without court adjudication of guilt pursuant to § 42-8-62 at the time he allegedly violated § 16-11-131, the trial court properly dismissed the charge. *State v. Mills*, 268 Ga. 873, 495 S.E.2d 1 (1998).

**42-8-38. Arrest or graduated sanctions for probationers violating terms; hearing; disposition of charge; procedure when probation revoked in county other than that of conviction.**

(a) Whenever, within the period of probation, a probation supervisor believes that a probationer under his or her supervision has violated his or her probation in a material respect, if graduated sanctions have been made a condition of probation by the court, the probation supervisor may impose graduated sanctions as set forth in Code Section 42-8-23 to address the specific conduct leading to such violation or, if the circumstances warrant, may arrest the probationer without warrant, wherever found, and return the probationer to the court granting the probation or, if under supervision in a county or judicial circuit other than that of conviction, to a court of equivalent original criminal jurisdiction within the county wherein the probationer resides for purposes of supervision. Any officer authorized by law to issue warrants may issue a warrant for the arrest of the probationer upon the affidavit of one having knowledge of the alleged violation, returnable forthwith before the court in which revocation proceedings are being brought.

(b) The court, upon the probationer being brought before it, may commit him or release him with or without bail to await further hearing or it may dismiss the charge. If the charge is not dismissed at this time, the court shall give the probationer an opportunity to be heard fully at the earliest possible date on his own behalf, in person or by counsel, provided that, if the revocation proceeding is in a court other than the court of the original criminal conviction, the sentencing court shall be given ten days' written notice prior to a hearing on the merits.

(c) After the hearing, the court may revoke, modify, or continue the probation. If the probation is revoked, the court may order the execution of the sentence originally imposed or of any portion thereof. In such event, the time that the defendant has served under probation shall be considered as time served and shall be deducted from and considered a part of the time he was originally sentenced to serve.

(d) In cases where the probation is revoked in a county other than the county of original conviction, the clerk of court in the county revoking probation may record the order of revocation in the judge's minute docket, which recordation shall constitute sufficient permanent record of the proceedings in that court. The clerk shall send one copy of the order revoking probation to the department to serve as a temporary commitment and shall send the original order revoking probation and all other papers pertaining thereto to the county of original conviction to be filed with the original records. The clerk of court of the county of original conviction shall then issue a formal commitment to the



department. (Ga. L. 1956, p. 27, § 12; Ga. L. 1960, p. 857, § 1; Ga. L. 1966, p. 440, § 1; Ga. L. 2012, p. 899, § 7-11/HB 1176.)

**The 2012 amendment**, effective July 1, 2012, in the first sentence of subsection (a), twice inserted “or her” near the beginning, substituted “respect, if graduated sanctions have been made a condition of probation by the court, the probation supervisor may impose graduated sanctions as set forth in Code Section 42-8-23 to address the specific conduct leading to such violation or, if the circumstances warrant, may” for “respect, he may”, and substituted “return the probationer” for “return him”. See editor’s note for applicability.

**Editor’s notes.** — Ga. L. 2012, p. 899, § 9-1(a)/HB 1176, not codified by the General Assembly, provides: “This Act shall become effective on July 1, 2012, and shall

apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense and shall be considered a prior conviction for the purpose of imposing a sentence that provides for a different penalty for a subsequent conviction for the same type of offense, of whatever degree or level, pursuant to this Act.”

**Law reviews.** — For survey article on criminal law and procedure for the period from June 1, 2002 through May 31, 2003, see 55 Mercer L. Rev. 117 (2003). For article on the 2012 amendment of this Code section, see 29 Ga. St. U.L. Rev. 290 (2012).

JUDICIAL DECISIONS

ANALYSIS

GENERAL CONSIDERATION

PROBATION REVOCATION PROCEDURE

1. IN GENERAL

QUANTUM OF PROOF NEEDED

5. REVIEW OF REVOCATION BY APPEALS COURT

EVIDENCE SUFFICIENT FOR REVOCATION

EVIDENCE INSUFFICIENT FOR REVOCATION

COMPUTATION OF AND CREDIT FOR TIME SERVED

General Consideration

**Applicable period.** — Trial court misinterpreted O.C.G.A. § 42-8-38(a), as dealing with matters which were done within the period of probation, when it denied the state’s petition to revoke a probationer’s probation. *State v. Huckeba*, 258 Ga. App. 627, 574 S.E.2d 856 (2002).

Where a convicted defendant’s “future good behavior” has already been compromised by the commission of another criminal act even before the formal probationary period begins, a trial court should not be required to allow such defendant to serve a previously imposed probated sentence when the court deems that protection of society demands revocation. The trial court’s interpretation of O.C.G.A. § 42-8-38(a) as precluding the exercise of its discretion to consider the state’s peti-

tion to revoke defendant’s probation was an error as a matter of law. *State v. Huckeba*, 258 Ga. App. 627, 574 S.E.2d 856 (2002).

**Warrantless searches vs. warrantless arrests.** — Trial court erred in denying a probationer’s motion to suppress the evidence seized from the probationer’s apartment as, even though the entry into the apartment for the purpose of effecting an arrest of the probationer was permissible, most of the evidence seized without a warrant after the probationer was not found in the apartment had to be excluded under the Fourth Amendment as the search conducted was only permissible insofar as the search involved the observation of items of obvious evidentiary value in plain view during the time and activities required to attempt the probationer’s arrest. The probationer was never

placed on notice that the probationer was going to be subjected to warrantless searches, and the state failed to demonstrate any exigent circumstances justifying the warrantless search. *Jones v. State*, 282 Ga. 784, 653 S.E.2d 456 (2007).

**Cited in** *Williams v. State*, 253 Ga. App. 10, 557 S.E.2d 473 (2001); *Sanders v. State*, 290 Ga. 445, 721 S.E.2d 834 (2012).

## **Probation Revocation Procedure**

### **1. In General**

#### **Revocation by different court.**

Judge in the Dublin judicial circuit had jurisdiction to revoke a former prisoner's probation because: (1) while the prisoner pled guilty in the Macon judicial circuit and the prisoner's sentence was probated, the prisoner was involved in a theft which resulted in a partial revocation of probation and assignment to a probation detention center in the Dublin judicial circuit and, during the prisoner's confinement in the Dublin judicial circuit, the prisoner violated the terms of the prisoner's probation; and (2) because the prisoner was under supervision in a judicial circuit other than that of the prisoner's conviction, the prisoner was properly returned to a court of equivalent original criminal jurisdiction within the county wherein the prisoner was residing for the purposes of supervision under O.C.G.A. § 42-8-38(a). *Williams v. Donald*, No. 5:06-cv-348, 2007 U.S. Dist. LEXIS 59438 (M.D. Ga. Aug. 14, 2007).

**Discretion following technical probation violations.** — Following technical violations of the conditions of probation, short of conviction for another crime or a determination of initial ineligibility, the trial court had discretion to continue a first offender on probation without first revoking first offender status, entering an adjudication of guilt, or resentencing for the underlying offense. *Mohammed v. State*, 226 Ga. App. 387, 486 S.E.2d 652 (1997).

**Nothing in O.C.G.A. § 42-8-38 ties the affidavit requirement for the issuance of arrest warrants to the validity of a subsequent revocation of probation.** Even if defendant's arrest on charges of violating defendant's probation

was illegal, that is not a bar to the subsequent revocation of defendant's probation. *Walker v. State*, 289 Ga. App. 879, 658 S.E.2d 375 (2008).

## **Quantum of Proof Needed**

### **5. Review of Revocation by Appeals Court**

#### **Evidence sufficient to support finding.**

Trial court erred in considering the prior testimony of witnesses who were not shown to be dead, disqualified or otherwise inaccessible in a probation revocation hearing; nevertheless, any inadmissible hearsay was merely cumulative of the admissible probative testimony which was sufficient to show by a preponderance of the evidence that defendant committed the offense of aggravated assault. *Wolcott v. State*, 278 Ga. 664, 604 S.E.2d 478 (2004).

#### **Evidence Sufficient for Revocation**

**Obstruction.** — Although the evidence that the probationer made the probationer's arrest warrant unavailable to the officers was circumstantial, it was sufficient to authorize the trial court's finding, by a preponderance of the evidence, that the probationer obstructed the officers. *Carlson v. State*, 280 Ga. App. 595, 634 S.E.2d 410 (2006), cert. denied, No. S06C2099, 2007 Ga. LEXIS 215 (Ga. 2007).

#### **Evidence Insufficient for Revocation**

**Failure of state to prove reliability of drug test.** — Revocation of probation based on defendant's failure of a drug test was error where the test result lacked probative value since no expert testimony was offered by the state to prove the scientific reliability of the ontrack system as used for the purpose of drug detection. *Bowen v. State*, 242 Ga. App. 631, 531 S.E.2d 104 (2000).

#### **Computation of and Credit for Time Served**

**Crediting of probation toward imprisonment, etc.**

In accord with *Stephens v. State*. See

McKinney v. State, 240 Ga. App. 812, 525 S.E.2d 395 (1999).

In the case of defendant who was convicted and sentenced for child molestation, a resentencing order requiring defendant to serve a total of 13 years — five to be served in prison beyond the three already served on probation, to be followed by an additional five years on probation — was not error because defendant was resentenced within the maximum sentence allowable by law, defendant was clearly advised of this possibility, and the court credited the time already served on probation. *Roland v. Meadows*, 273 Ga. 857, 548 S.E.2d 289 (2001).

Trial court did not err in granting summary judgment to the defendants in an inmate's action alleging that the inmate, who had violated probation, was impris-

oned for longer than allowed as O.C.G.A. § 42-8-38 did not require the inmate's pre-revocation of probation jail time to be credited toward the inmate's sentence in a manner that would reduce the overall time served (either on probation or in confinement) to something less than the 10 years for which the inmate was sentenced. *Stallings v. Sparks*, 314 Ga. App. 216, 723 S.E.2d 514 (2012).

#### **Increase of original sentence prohibited.**

Where the defendant violated the terms of his probation, the court could not impose the maximum sentence without giving him credit for time served on probation, since to do so would impose a sentence exceeding the maximum allowed by law. *Franklin v. State*, 236 Ga. App. 401, 512 S.E.2d 304 (1999).

### **OPINIONS OF THE ATTORNEY GENERAL**

#### **Fingerprinting of offenders.**

An offense under this section requires fingerprinting only in those instances in which an adverse action is taken against

the probationer such that the adverse action actually alters the terms of his or her probation. 1998 Op. Att'y Gen. No. 98-20.

#### **42-8-39. Suspension of sentence does not place defendant on probation.**

### **JUDICIAL DECISIONS**

**Cited in** *United States v. Ayala-Gomez*, 255 F.3d 1314 (11th Cir. 2001).

#### **42-8-40. Confidentiality of papers; exemption from subpoena; declassification; limited use by personnel.**

(a) Except as provided in subsection (b) of this Code section, all reports, files, records, and papers of whatever kind relative to the state-wide probation system are declared to be confidential and shall be available only to the probation system officials and to the judge handling a particular case. They shall not be subject to process of subpoena. However, the commissioner may by written order declassify any such records.

(b) Supervision records of the State Board of Pardons and Paroles may be made available to officials employed with the state-wide probation system, provided that the same shall remain confidential and not available to any other person or subject to subpoena unless declassified by the State Board of Pardons and Paroles. (Ga. L. 1956, p.



27, § 19; Ga. L. 1958, p. 15, § 11; Ga. L. 2003, p. 421, § 1; Ga. L. 2011, p. 620, § 1/SB 214.)

**The 2003 amendment**, effective July 1, 2003, substituted the present last sentence for the former last sentence, which read: "However, these records may be declassified by a majority vote of the board whenever the board deems it advisable."

**The 2011 amendment**, effective July 1, 2011, designated the existing provisions as subsection (a); substituted "Except as provided in subsection (b) of this Code section, all" for "All" at the beginning of subsection (a); and added subsection (b).

## JUDICIAL DECISIONS

**Refreshing recollection with confidential presentence investigation report.** — In a proceeding to terminate the parental rights of a father who had been convicted of molesting his children, the trial court did not err in allowing a proba-

tion official to use a confidential presentence investigation report to refresh his recollection about interviews he had with the father. *In re S.M.L.*, 228 Ga. App. 81, 491 S.E.2d 186 (1997).

### 42-8-43.1. Participation in cost of county probation systems; merging of county systems into state system.

## JUDICIAL DECISIONS

**Probation as part of Department of Corrections.** — Since the probation office was part of the Department of Corrections under O.C.G.A. § 42-8-43.1, the district court properly dismissed the probationer's claims against the probation office as friv-

olous under 28 U.S.C. § 1915(e)(2)(B)(i). A suit against the probation office was barred by the Eleventh Amendment. *Lovelace v. Dekalb Cent. Prob.*, 2005 U.S. App. LEXIS 16090 (11th Cir. Aug. 3, 2005) (Unpublished).

## ARTICLE 3

### PROBATION OF FIRST OFFENDERS

## JUDICIAL DECISIONS

**Applicability.** — This article does not apply to the sentence for violent felonies outlined in § 17-10-6.1. *Fleming v. State*, 233 Ga. App. 483, 504 S.E.2d 542 (1998), overruling *State v. Allmond*, 225 Ga. App. 509, 484 S.E.2d 306 (1997).

Defendant found guilty of a serious violent felony under § 17-10-6.1 could apply

for first offender status prior to the 1998 amendments to this article. *Fleming v. State*, 271 Ga. 587, 523 S.E.2d 315 (1999), reversing *Fleming v. State*, 233 Ga. App. 483, 504 S.E.2d 542 (1998), reversing *Fleming v. State*, 233 Ga. App. 483, 504 S.E.2d 542 (1998). *Horton v. State*, 241 Ga. App. 605, 527 S.E.2d 254 (1999).

## OPINIONS OF THE ATTORNEY GENERAL

**Applicability to misdemeanors.** — The First Offender Act is applicable to

misdemeanor offenses. 2000 Op. Att'y Gen. No. 2000-1.

**42-8-60. Probation prior to adjudication of guilt; violation of probation; review of criminal record by judge.**

(a) Upon a verdict or plea of guilty or a plea of nolo contendere, but before an adjudication of guilt, in the case of a defendant who has not been previously convicted of a felony, the court may, without entering a judgment of guilt and with the consent of the defendant:

(1) Defer further proceeding and place the defendant on probation as provided by law; or

(2) Sentence the defendant to a term of confinement as provided by law.

(b) Upon violation by the defendant of the terms of probation, upon a conviction for another crime during the period of probation, or upon the court determining that the defendant is or was not eligible for sentencing under this article, the court may enter an adjudication of guilt and proceed as otherwise provided by law. No person may avail himself or herself of this article on more than one occasion.

(c) The court shall not sentence a defendant under the provisions of this article and, if sentenced under the provisions of this article, shall not discharge the defendant upon completion of the sentence unless the court has reviewed the defendant's criminal record as such is on file with the Georgia Crime Information Center.

(d) The court shall not sentence a defendant under the provisions of this article who has been found guilty of or entered a plea of guilty or a plea of nolo contendere for:

(1) A serious violent felony as such term is defined in Code Section 17-10-6.1;

(2) A sexual offense as such term is defined in Code Section 17-10-6.2;

(3) Sexual exploitation of a minor as defined in Code Section 16-12-100;

(4) Electronically furnishing obscene material to a minor as defined in Code Section 16-12-100.1;

(5) Computer pornography and child exploitation, as defined in Code Section 16-12-100.2; or

(6)(A) Any of the following offenses when such offense is committed against a law enforcement officer while such officer is engaged in the performance of his or her official duties:

(i) Aggravated assault in violation of Code Section 16-5-21;

(ii) Aggravated battery in violation of Code Section 16-5-24; or

(iii) Obstruction of a law enforcement officer in violation of subsection (b) of Code Section 16-10-24, if such violation results in serious physical harm or injury to such officer.

(B) As used in this paragraph, the term “law enforcement officer” means:

(i) A “peace officer” as such term is defined in paragraph (8) of Code Section 35-8-2;

(ii) A law enforcement officer of the United States government;

(iii) A person employed as a campus police officer or school security officer;

(iv) A conservation ranger; and

(v) A jail officer employed at a county or municipal jail. (Ga. L. 1968, p. 324, § 1; Ga. L. 1982, p. 1807, § 1; Ga. L. 1985, p. 380, § 1; Ga. L. 1986, p. 218, § 1; Ga. L. 2006, p. 379, § 26/HB 1059; Ga. L. 2012, p. 172, § 1/SB 231.)

**The 2006 amendment**, effective July 1, 2006, in the second sentence of subsection (b), inserted “or herself”; and added subsection (d).

**The 2012 amendment**, effective July 1, 2012, deleted “or” at the end of paragraph (d)(4); substituted “; or” for a period at the end of paragraph (d)(5); and added paragraph (d)(6).

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2006, “plea of guilty or” was substituted for “plea of guilty of” in the introductory language of subsection (d).

**Editor’s notes.** — Ga. L. 2006, p. 379, § 30, not codified by the General Assembly, provides that: “The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting,

or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment.”

**Law reviews.** — For annual survey article on evidence, see 50 Mercer L. Rev. 229 (1998). For annual survey of criminal law, see 57 Mercer L. Rev. 113 (2005). For annual survey of evidence law, see 57 Mercer L. Rev. 187 (2005). For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 11 (2006). For annual survey of criminal law, see 58 Mercer L. Rev. 83 (2006). For article, “No Second Chances: Immigration Consequences of Criminal Charges,” see 13 Ga. St. B.J. 26 (2007).

For note, “Padilla v. Kentucky: The Criminal Defense Attorney’s Obligation to Warn of Immigration Consequences of Criminal Conviction,” see 29 Ga. St. U.L. Rev. 891 (2012).

## JUDICIAL DECISIONS

### Provisions not applicable to DUI cases.

O.C.G.A. § 40-6-391(f) did not violate equal protection under the Fourteenth Amendment or Ga. Const. 1983, Art. I, Sec. I, Para. II by excluding DUI offenses

from First Offender Act, O.C.G.A. § 42-8-60 et seq., coverage. The defendant did not show the absence of a rational relationship between the state’s compelling interest in protecting the public’s safety and the classification; the defen-



defendant's equal protection argument boiled down to no more than the claim that the legislature made a bad policy judgment about which offenders should be eligible for First Offender Act treatment. *Rhodes v. State*, 283 Ga. 361, 659 S.E.2d 370 (2008).

**Prior conviction under First Offender Act counts in calculation of criminal history.** — Because defendant, who was discharged without adjudication of guilt under the Georgia First Offender Act (GFOA) after successfully completing probation, was not entitled to expungement of records, defendant's prior drug conviction under the GFOA was not expunged and the district court properly included that conviction in the calculation of defendant's criminal history category pursuant to U.S. Sentencing Guidelines Manual § 4A1.2 and properly sentenced the defendant to 21 months in prison for violating 21 U.S.C. § 841(a)(1), (b)(1)(C). *United States v. Knight*, 2005 U.S. App. LEXIS 24785 (11th Cir. Nov. 15, 2005) (Unpublished).

**Construction with O.C.G.A. § 17-10-1.** — Trial court did not err by sentencing defendant to both confinement and probation in violation of the First Offender Act, under O.C.G.A. § 42-8-60(a), as the statute did not mandate a sentence of either confinement or probation, and defendant's probation was not conditioned upon the defendant spending some specified time incarcerated; O.C.G.A. § 17-10-1(a)(1) granted to the sentencing judge the power and authority to suspend or probate all or any part of the entire sentence under such rules and regulations as the judge deems proper. *Johanson v. State*, 260 Ga. App. 181, 581 S.E.2d 564 (2003).

After the defendant was found guilty of arson and sentenced, the sentence could not be modified, pursuant to O.C.G.A. § 17-10-1(f) to grant the defender first offender treatment because the plain language of the first offender statute, O.C.G.A. § 42-8-60 et seq., specifically prohibited such a modification after sentencing. *Burchette v. State*, 274 Ga. App. 873, 619 S.E.2d 323 (2005).

**Construction with O.C.G.A. § 17-10-6.** — State's claim that defendant's sentence was not subject to review

because it followed a probation revocation was rejected as the defendant initially was sentenced as a First Offender; O.C.G.A. § 42-8-60 et seq., sentence was revoked and a sentence of 12 or more years was imposed. *State v. Swartz*, 277 Ga. App. 241, 626 S.E.2d 210 (2006).

**Construed with O.C.G.A. § 16-6-3.** — The trial court did not err in denying the defendant's request to charge the jury on misdemeanor statutory rape and in imposing a felony sentence, as: (1) a charge of misdemeanor statutory rape was not supported by the evidence, due to the difference in the defendant's and the victim's age at the time of the offense; (2) the defendant's requested charge set forth an incorrect principle of law within the context of the case; and (3) the sentence of five years probation under the First Offender Act, O.C.G.A. § 42-8-60 et seq., fell within the statutory range. *Orr v. State*, 283 Ga. App. 372, 641 S.E.2d 613 (2007).

Based on the plain language of O.C.G.A. §§ 17-10-6.2(a)(4) and 42-8-60(d)(2), a defendant who commits statutory rape is excluded from first offender consideration if the defendant was 21 years of age or older. Thus, a defendant who was 18 at the time of the offense and 19 at the time of the conviction was eligible for first offender consideration. *Planas v. State*, 296 Ga. App. 51, 673 S.E.2d 566 (2009).

**First-offender petition.** — Defendant's first-offender petition filed after the verdict was returned but before the court entered the sentence was timely. *Fleming v. State*, 233 Ga. App. 483, 504 S.E.2d 542 (1998).

**First-offender status is discretionary.**

Following technical violations of the conditions of probation, short of conviction for another crime or a determination of initial ineligibility, the trial court had discretion to continue a first offender on probation without first revoking first offender status, entering an adjudication of guilt, and resentencing for the underlying offense. *Mohammed v. State*, 226 Ga. App. 387, 486 S.E.2d 652 (1997).

Nothing in Georgia's First Offender Act, O.C.G.A. § 42-8-60 et seq., required the trial court sua sponte to consider defen-

dant's status as a first offender, and the trial court did not err by adopting a sentence that was consistent with the sentence the prosecutor agreed to recommend if defendant pled guilty to robbery by intimidation. *Gibson v. State*, 257 Ga. App. 134, 570 S.E.2d 437 (2002).

Trial court did not fail to exercise its discretion in considering and then denying defendant's request for first offender treatment with regard to the defendant's conviction upon a non-negotiated guilty plea for aggravated assault and possession of a firearm during the commission of a crime, because the record showed that the trial judge considered the request and determined that, given the nature of the offense, it would be inappropriate to grant such status. *Steele v. State*, 270 Ga. App. 488, 606 S.E.2d 664 (2004).

**Application.** — Trial court did not abuse the court's discretion by denying the defendant's request for first offender treatment, pursuant to O.C.G.A. § 42-8-60, because the trial court's remarks during sentencing did not indicate a lack of awareness that the court had the discretion, was not applying a mechanical policy that prevented proper consideration of the request, or that there was an outright refusal to consider the request. *McCullough v. State*, 317 Ga. App. 853, 733 S.E.2d 36 (2012).

Trial court properly declined to grant appellant first offender treatment under O.C.G.A. § 42-8-60 on all the crimes in the four separate charging instruments to which the offender pled guilty because when the first judgment was entered, the offender had benefitted from first offender treatment on a verdict or plea and could not do so again. *Higdon v. State*, 291 Ga. 821, 733 S.E.2d 750 (2012).

**First offender status does not mandate probationary period.** — Under O.C.G.A. § 42-8-60(a), a trial court may place a first offender defendant on probation or sentence the defendant to a term of confinement as provided by law and nothing in the statute mandates a probationary period for first offenders; on the contrary, a trial court exercises its discretion in determining whether to grant probation to a first offender. Therefore, defendant, who was sentenced as recommended

by the plea agreement, properly had defendant's motion to correct sentence denied. *Wilson v. State*, 259 Ga. App. 627, 578 S.E.2d 260 (2003).

**Consideration of first offender status mandatory.**

Trial court violated O.C.G.A. § 42-8-60(a) by failing to exercise its discretion and refusing to consider sentencing defendant as a first offender because defendant opted for a jury trial; the use of a mechanical sentencing formula was an abdication of judicial responsibility. *Cook v. State*, 256 Ga. App. 353, 568 S.E.2d 482 (2002).

Defendant's sentence for numerous threat, obstruction, and fleeing convictions could not stand since the trial court abdicated its judicial responsibility by adopting an inflexible rule in not hearing defendant's oral motion for first offender treatment. *Ramage v. State*, 259 Ga. App. 616, 578 S.E.2d 245 (2003).

Trial court abused its discretion in not even considering defendant's request for first-offender sentencing, based on its inflexible rule that it did not consider first-offender sentencing where a defendant went to trial and its belief that defendant should have testified; even though the trial court was not required to grant first-offender status, it was required to at least consider defendant's request. *Wnek v. State*, 262 Ga. App. 733, 586 S.E.2d 428 (2003).

**Registration as special condition of probation.** — Trial court did not err in imposing a special requirement on defendant's probation of registration as a sex offender, even though the defendant was sentenced under the First Offender Act, O.C.G.A. § 42-8-60 et seq., as the imposition of that special condition was authorized under the language in § 42-8-62(a) and to rule otherwise would render meaningless the language in § 42-8-62(a) concerning registration requirements. *Evors v. State*, 275 Ga. App. 345, 620 S.E.2d 596 (2005).

**Mere reminder insufficient to request sentencing under first offender act.** — Merely reminding the sentencing judge that the conviction is the defendant's first offense is not equivalent to a request for sentencing under the Georgia



First Offender Act. *Powell v. State*, 271 Ga. App. 550, 610 S.E.2d 178 (2005).

**First offender treatment may not be granted after defendant has been sentenced.**

After the defendant was found guilty of arson and sentenced for that offense, the plain language of O.C.G.A. § 42-8-60(a) barred a trial court from considering the defendant's motion to be granted first offender treatment. *Burchette v. State*, 274 Ga. App. 873, 619 S.E.2d 323 (2005).

After a defendant was convicted for statutory rape, the trial court lacked jurisdiction to resentence the defendant as a first offender or to rescind the conviction or confinement portion of the sentence. First offender treatment was only permitted before a defendant had been adjudicated guilty and sentenced. *State v. Stulb*, 296 Ga. App. 510, 675 S.E.2d 253 (2009).

**First offender treatment not barred prior to the 1998 amendments.** — Prior to the 1998 amendments to § 17-10-6.1 and the First Offender Act, a defendant found guilty of a serious violent felony under § 17-10-6.1 was not barred from requesting and obtaining first offender treatment. *Burns v. State*, 241 Ga. App. 886, 528 S.E.2d 547 (2000).

**Out of state conviction.** — Trial court did not err by denying defendant first-offender treatment as defendant presented no evidence, in the form of a certified copy of the conviction in another state in which defendant was sentenced to a one-year term of probation, that the prior conviction in the other state was a misdemeanor. *Middleton v. State*, 264 Ga. App. 615, 591 S.E.2d 493 (2003).

**First offender status application to misdemeanors.** — In a felony case where defendant's first offender status was removed from the sentence defendant received for pleading guilty to theft by receiving a stolen motor vehicle because defendant had previously pled guilty to a misdemeanor, the appellate court held that the Georgia First Offender Act, O.C.G.A. § 42-8-60 et seq., applied to misdemeanors. *Stafford v. State*, 251 Ga. App. 203, 554 S.E.2d 219 (2001).

**Construed with O.C.G.A. § 17-10-6.1.** — Applying the Georgia Su-

preme Court's holding from *Fleming v. State*, 271 Ga. 587, 523 S.E.2d 315 (1999), resentencing was required because, prior to the 1998 amendments to §§ 17-10-6.1 and 42-8-60 et seq., a defendant found guilty of a serious violent felony under § 17-10-6.1 was not precluded from requesting and obtaining first offender treatment. *Burleson v. State*, 242 Ga. App. 217, 529 S.E.2d 228 (2000).

**Type of evidence necessary to support revocation.**

Because the evidence showed that the probationer had continuous access to the firearms in the house on the day of a fatal shooting, and that the probationer intended to, and did in fact exercise control over the sons' access to one of the guns in the minutes leading up to the shooting, the trial court properly found that the probationer had constructive possession of the firearm. *Wright v. State*, 279 Ga. App. 299, 630 S.E.2d 774 (2006).

**Adjudication of guilt upon violation of probation or conviction for other crime.**

By committing a new crime, defendant lost the benefit of first offender status, and the unadjudicated guilt in connection with the prior state offense was properly considered a prior conviction for purposes of sentencing under the U.S. Sentencing Guidelines Manual, which pursuant to U.S. Sentencing Guidelines Manual § 4A1.2, mandated the imposition of criminal history points, even if doing so undermined the purpose of the Georgia's First Offender Act, O.C.G.A. § 42-8-60 et seq. *United States v. Barner*, 572 F.3d 1239 (11th Cir. 2009).

Trial court did not err in increasing the sentence originally imposed upon the defendant because the defendant was informed when the first offender probation sentence was pronounced that, upon an adjudication of guilt, the defendant could be sentenced to the maximum allowable under the law; although the sentencing form was ambiguous since both the first offender treatment box and the felony sentence box were checked the ambiguity in the form was not fatal to the trial court's imposition of a sentence greater than the original one. *Otuwa v. State*, 303 Ga. App. 410, 693 S.E.2d 610 (2010).



**Sentence after expiration of first offender probation period.**

Trial court had the authority to revoke the defendant's first offender status and enter an adjudication of guilt for the defendant's violations of probation, pursuant to O.C.G.A. §§ 42-8-34(g) and 42-8-60(b), because the defendant was still serving the defendant's probated sentence. Further, because the trial court, when pronouncing the defendant's first offender sentence, advised the defendant that, upon adjudication of guilt, the defendant could be resentenced to the statutory maximum for two counts of child molestation, and that the time served would be credited against the defendant's new sentence, the trial court was authorized to increase the sentence originally imposed. *Kaylor v. State*, 312 Ga. App. 633, 719 S.E.2d 530 (2011).

**Length of sentence.**

Where defendant's sentence under paragraph (a)(1) was five years' probation, with the requirement that 90 to 120 days be served in a probation boot camp, later modified to a probation detention center, when defendant's probation was revoked, the trial court could have sentenced defendant to the maximum penalty for the burglary conviction. *McKinney v. State*, 240 Ga. App. 812, 525 S.E.2d 395 (1999).

**Time served on probation credited to sentence after probation revoked, etc.**

In accord with *Stephens v. State*. See *McKinney v. State*, 240 Ga. App. 812, 525 S.E.2d 395 (1999).

Where the defendant violated the terms of his probation, the court could not impose the maximum sentence without giving him credit for time served on probation, since to do so would impose a sentence exceeding the maximum allowed by law. *Franklin v. State*, 236 Ga. App. 401, 512 S.E.2d 304 (1999).

In the case of defendant who was convicted and sentenced for child molestation, a resentencing order requiring defendant to serve a total of 13 years — five to be served in prison beyond the three already served on probation, to be followed by an additional five years on probation — was not error because defendant was resentenced within the maximum sentence

allowable by law, defendant was clearly advised of this possibility, and the court credited the time already served on probation. *Roland v. Meadows*, 273 Ga. 857, 548 S.E.2d 289 (2001).

**Sentence vacated and resentencing ordered** when the trial court erred by increasing a juvenile defendant's voluntary manslaughter sentence after the defendant had already begun serving the same, because the original sentence was final at the time it was imposed, and defendant had no reason to believe otherwise; hence, the trial court's increased sentence constituted double jeopardy and could not stand. *Williams v. State*, 273 Ga. App. 42, 614 S.E.2d 146 (2005).

**Double jeopardy concerns did not prohibit resentencing after original sentence had begun** being served if the resentencing was allowed by law and the defendant had no reasonable expectation in the finality of the original sentence; resentencing after a defendant had begun serving the original sentence was allowed under the First Offender Act, O.C.G.A. § 42-8-60 et seq., because defendant initially lied to the trial court about a prior conviction to receive first offender treatment, and since defendant was warned by the trial court that the defendant was subject to resentencing if he was untruthful about the defendant's record, the defendant had no reasonable expectation that the original sentence was final. *Wilford v. State*, 278 Ga. 718, 606 S.E.2d 252 (2004).

**Failure to sentence under first offender act affirmed.** — Defendant's 10-year sentence for forgery was affirmed as the defendant attorney twice reminded the sentencing court of defendant's first offender status, but did not request that the defendant be sentenced under the Georgia First Offender Act; absent clear, i.e., unambiguous, statements in the record showing: (1) an explicit request for First Offender Act treatment at the time of sentencing; and (2) a failure to exercise discretion as evidenced by a misunderstanding of the law or a general policy against First Offender Act treatment, a defendant's sentence must be upheld. *Powell v. State*, 271 Ga. App. 550, 610 S.E.2d 178 (2005).

Trial court was authorized to consider the defendant's indifference to both the terms of the bond requirements imposed and the underlying charges filed in its decision regarding whether or not to treat the defendant as a first offender; hence, it did not err in declining to impose sentence under the first offender statute. *Collins v. State*, 281 Ga. App. 240, 636 S.E.2d 32 (2006).

**Witness's first offender sentencing records were inadmissible in defendant's trial.** — After defendant cross-examined a witness for the state regarding the witness's first offender sentence under the First Offender Act, O.C.G.A. § 42-8-60 et seq., in an effort to show witness bias, the trial court erred in requiring defendant to introduce into evidence certified copies of the relevant sentencing record and in thus denying defendant the right to open and conclude closing arguments by forcing defendant to present evidence, as defendant had a right under the Confrontation Clause of U.S. Const. amend. VI to cross-examine the witness regarding the witness's first offender probation status to show bias, but the records relevant to that status were not admissible because there was no adjudication of the witness's guilt; the error, however, was harmless in light of the overwhelming evidence of defendant's guilt. *Smith v. State*, 276 Ga. 263, 577 S.E.2d 548 (2003).

Trial court did not abuse the court's discretion in prohibiting the defendant's cross-examination of a witness regarding the witness's first offender plea in order to show bias and a motive to testimony favorable to the state because there was no evidence showing the connection between the witness's first offender status and the witness's desire to shade the witness's testimony to curry favor with the state; the defendant had to present facts in addition to the existence of two first offender pleas to support the defendant's efforts to impeach the witness for bias. *Sanders v. State*, 290 Ga. 445, 721 S.E.2d 834 (2012).

**Use in three-felony recidivist sentencing.** — Remand was necessary because it was unclear whether one of defendant's convictions, which was a first

offender conviction pursuant to O.C.G.A. § 42-8-60 et seq., was successfully completed, in which case there was no "conviction" as that term was defined under O.C.G.A. § 16-1-3(4) because there was no adjudication of guilt, or alternatively, whether the first offender sentence was violated and the trial court thereafter entered an adjudication of guilt and a sentence thereon, in which case it could be counted as one of the three felonies for purposes of recidivist sentencing under O.C.G.A. § 17-10-7(c). *Swan v. State*, 276 Ga. App. 827, 625 S.E.2d 97 (2005).

**Appeal discretionary.** — Because the drug court program under O.C.G.A. § 16-13-2(a) is similar to the first offender statute of O.C.G.A. § 42-8-60 and because § 42-8-60 appeals are discretionary under O.C.G.A. § 5-6-35(a)(5), the discretionary appeal procedures of § 5-6-35(a)(5) must be followed when appealing after violation of the conditions of the drug court program. *Andrews v. State*, 276 Ga. App. 428, 623 S.E.2d 247 (2005).

**Appellate review.** — Presumption exists that a trial court has regularly and correctly conducted the proceedings; thus, absent clear statements in the record showing an explicit request for first offender treatment at the time of sentencing and a failure to exercise discretion as evidenced by a misunderstanding of the law or a general policy against first offender treatment, the appellate court will affirm the sentence as pronounced by the trial court. *McCullough v. State*, 317 Ga. App. 853, 733 S.E.2d 36 (2012).

**Withdrawal of guilty plea.** — Trial court did not err in instructing defendant that defendant would not be allowed to withdraw the Alford plea between the time it was entered and the pronouncement of the sentence; this instruction did not violate O.C.G.A. § 17-7-93(b), as that statute did not apply to pleas resulting in treatment as a first offender under the Georgia First Offender Act, O.C.G.A. § 42-8-60 et seq. *Winkles v. State*, 275 Ga. App. 351, 620 S.E.2d 594 (2005).

**First offender treatment is "conviction" under Immigration and Nationality Act.** — Board of Immigration Appeals (BIA) did not abuse its discretion when it denied the alien's motion to re-



open because: (1) the alien pled guilty to two counts of child molestation and received five years probation on each count, thereby satisfying the requirements of 8 U.S.C. § 1101(a)(48)(A), and the mere fact that the alien was sentenced pursuant to Georgia's First Offender Act, O.C.G.A. § 42-8-60(a) did not mean that the alien lacked a "conviction" for purposes of 8 U.S.C. § 1227; (2) nothing in the alien's extraordinary motion for a new trial, the state's nolle prosequere motion, or the superior court's orders indicated that the alien's guilty plea was taken in violation of Georgia law or the federal constitution, and; (3) although it was uncontroverted that a full and unconditional pardon would have defeated the charge that the alien was removable under 8 U.S.C. § 1227(a)(2)(A)(iii), the BIA did not abuse its discretion when it refused to consider the alien's uncertified copy of the alien's pardon; and (4) even if the BIA had considered the alien's pardon, the pardon would not have eliminated the additional grounds for removal that the alien conceded to at the removal hearing. *Mohammed Salim Ali v. United States AG*, 443 F.3d 804 (11th Cir. 2006).

**First offender treatment is not "conviction" for purposes of serving on a jury.** — Prospective petit juror serving a sentence under the First Offender Act, O.C.G.A. § 42-8-60 et seq., had not been "convicted" within the meaning of O.C.G.A. § 15-12-163(b)(5), which allowed either the state or the accused to

object to the seating of a juror who had been convicted of a felony; the trial court therefore erred in disqualifying the juror for cause. *Humphreys v. State*, 287 Ga. 63, 694 S.E.2d 316, cert. denied, 131 S. Ct. 599, 178 L. Ed. 2d 438 (2010).

**Defendant eligible to serve ordered term of confinement.** — Trial court did not err in denying the defendant's motion to correct an illegal sentence because, in accordance with the plain language of the First Offender Act, O.C.G.A. § 42-8-65(c), during the defendant's term of confinement, the defendant, who pled guilty to first degree cruelty to children, O.C.G.A. § 16-5-70, was deemed to be a convicted felon for purposes of the State-Wide Probation Act, O.C.G.A. § 42-8-35.4, and, consequently, within a category of persons eligible to serve the ordered term of confinement at a probation detention center; the legislature is presumed to have had full knowledge of the First Offender Act when the legislature enacted the State-Wide Probation Act. *Mason v. State*, 310 Ga. App. 118, 712 S.E.2d 76 (2011).

**Cited in** *Camaron v. State*, 246 Ga. App. 80, 539 S.E.2d 577 (2000); *Threlkeld v. State*, 250 Ga. App. 44, 550 S.E.2d 454 (2001); *Smith v. State*, 282 Ga. App. 317, 638 S.E.2d 440 (2006); *Ciccio v. City of Hephzibah*, 289 Ga. App. 134, 656 S.E.2d 245 (2008); *Walker v. State*, 289 Ga. App. 879, 658 S.E.2d 375 (2008); *Rayshad v. State*, 295 Ga. App. 29, 670 S.E.2d 849 (2008).

## 42-8-61. Defendant to be informed of terms of article at time sentence imposed.

### JUDICIAL DECISIONS

**Defendant informed of consequences if probation violated.** — Trial court did not err in increasing the sentence originally imposed upon the defendant because the defendant was informed when the first offender probation sentence was pronounced that, upon an adjudication of guilt, the defendant could be sentenced to the maximum allowable under

the law; although the sentencing form was ambiguous since both the first offender treatment box and the felony sentence box were checked, the ambiguity in the form was not fatal to the trial court's imposition of a sentence greater than the original one. *Otuwa v. State*, 303 Ga. App. 410, 693 S.E.2d 610 (2010).



**42-8-62. Discharge of defendant without adjudication of guilt.**

(a) Upon fulfillment of the terms of probation, upon release by the court prior to the termination of the period thereof, or upon release from confinement, the defendant shall be discharged without court adjudication of guilt. Except for the registration requirements under the state sexual offender registry and except as otherwise provided in Code Section 42-8-63.1, the discharge shall completely exonerate the defendant of any criminal purpose and shall not affect any of his or her civil rights or liberties; and the defendant shall not be considered to have a criminal conviction. It shall be the duty of the clerk of court to enter on the criminal docket and all other records of the court pertaining thereto the following:

“Discharge filed completely exonerates the defendant of any criminal purpose and shall not affect any of his or her civil rights or liberties, except for registration requirements under the state sexual offender registry and except with regard to employment providing care for minor children or elderly persons as specified in Code Section 42-8-63.1; and the defendant shall not be considered to have a criminal conviction. O.C.G.A. 42-8-62.”

Such entry shall be written or stamped in red ink, dated, and signed by the person making such entry or, if the docket or record is maintained using computer print-outs, microfilm, or similar means, such entry shall be underscored, boldface, or made in a similar conspicuous manner and shall be dated and include the name of the person making such entry. The criminal file, docket books, criminal minutes and final record, and all other records of the court relating to the offense of a defendant who has been discharged without court adjudication of guilt pursuant to this subsection shall not be altered as a result of that discharge, except for the entry of discharge thereon required by this subsection, nor shall the contents thereof be expunged or destroyed as a result of that discharge.

(b) Should a person be placed under probation or in confinement under this article, a record of the same shall be forwarded to the Georgia Crime Information Center. Without request of the defendant a record of discharge and exoneration, as provided in this Code section, shall in every case be forwarded to the Georgia Crime Information Center. In every case in which the record of probation or confinement shall have been previously forwarded to the Department of Corrections, to the Georgia Crime Information Center, and to the Identification Division of the Federal Bureau of Investigation and a record of a subsequent discharge and exoneration of the defendant has not been forwarded as provided in this Code section, upon request of the defendant or his attorney or representative, the record of the same shall

be forwarded by the clerk of court so as to reflect the discharge and exoneration. (Ga. L. 1968, p. 324, § 2; Ga. L. 1978, p. 1621, § 1; Ga. L. 1982, p. 1807, § 3; Ga. L. 1985, p. 283, § 1; Ga. L. 1986, p. 442, § 1; Ga. L. 1990, p. 735, § 1; Ga. L. 2001, p. 1004, § 2; Ga. L. 2003, p. 840, § 4.)

**The 2001 amendment**, effective July 1, 2001, in subsection (a), in the second sentence, substituted "Except for the registration requirements under the state sexual offender registry, the" for "The" and inserted "or her" and, in the first undesignated paragraph, inserted "or her" and inserted ", except for registration requirements under the state sexual offender registry".

**The 2003 amendment**, effective July 1, 2004, in subsection (a), inserted "and except as otherwise provided in Code Sec-

tion 42-8-63.1" near the beginning of the second sentence and inserted "and except with regard to employment providing care for minor children or elderly persons as specified in Code Section 42-8-63.1" near the end of the first undesignated paragraph.

**Law reviews.** — For note on the 2001 amendment to O.C.G.A. § 42-8-62, see 18 Ga. St. U.L. Rev. 227 (2001). For note on the 2003 amendment to this Code section, see 20 Ga. St. U.L. Rev. 179 (2003).

## JUDICIAL DECISIONS

### **Necessity of adjudication of guilt.**

— Despite defendant's two violations of the conditions of probation, because no adjudication of guilt was entered during the term of the defendant's first offender probationary sentence, upon fulfillment of the probationary period, the defendant was entitled to discharge without an adjudication of guilt under O.C.G.A. § 42-8-62(a). *Ailara v. State*, 311 Ga. App. 862, 717 S.E.2d 498 (2011).

**First-offender prohibited from obtaining pistol permit.** — Provision of § 16-11-129(b), prohibiting the granting of a pistol permit to a person convicted as a first-offender for possession of a controlled substance, applied prospectively to an applicant who had been discharged as a first-offender five years before enactment of the provision. *Foss v. Probate Court of Chatham County*, 232 Ga. App. 612, 502 S.E.2d 278 (1998).

**"Discharge" automatic upon completion of term.** — The "discharge" of a non-first-offender probationer is automatic upon the successful completion of the terms of the sentence and is not dependent upon the subsequent formalization of that successful completion. *State v. Mills*, 268 Ga. 873, 495 S.E.2d 1 (1998).

Where the defendant was sentenced under this article to five years of probation on one count, followed by five consecutive

12 month sentences on other counts, he was entitled to have his record cleared of the first count under this article after completing his first five years of probation. *Arrington v. State*, 234 Ga. App. 187, 505 S.E.2d 851 (1998).

Defendant, pursuant to O.C.G.A. § 42-8-62(a), was not automatically discharged under the Georgia First Offender Act, O.C.G.A. § 42-8-60, when the defendant was released from confinement because the automatic discharge of the defendant occurred upon the successful completion of the terms of the defendant's sentence. *Kaylor v. State*, 312 Ga. App. 633, 719 S.E.2d 530 (2011).

### **Use of prior prosecution in which defendant given first-offender treatment.**

Because defendant had completed a three-year first-offender probationary sentence and had been discharged without court adjudication of guilt pursuant to this section at the time he allegedly violated § 16-11-131, the trial court properly dismissed the charge. *State v. Mills*, 268 Ga. 873, 495 S.E.2d 1 (1998).

Because defendant, who was discharged without adjudication of guilt under the Georgia First Offender Act (GFOA) after successfully completing probation, was not entitled to expungement of records, defendant's prior drug conviction under



the GFOA was not expunged and the district court properly included that conviction in the calculation of defendant's criminal history category pursuant to U.S. Sentencing Guidelines Manual § 4A1.2 and properly sentenced the defendant to 21 months in prison for violating 21 U.S.C. § 841(a)(1), (b)(1)(C). *United States v. Knight*, 2005 U.S. App. LEXIS 24785 (11th Cir. Nov. 15, 2005) (Unpublished).

**Impeachment of witness through first-offender record.** — In both civil and criminal cases, unless there is an adjudication of guilt, a witness may not be impeached on general credibility grounds by evidence of a first offender record. *Matthews v. State*, 268 Ga. 798, 493 S.E.2d 136 (1997).

Under the First Offender Act, O.C.G.A. § 42-8-60 et seq., the trial court properly prohibited a defendant from impeaching a witness with a forgery offense. The defendant cited no authority in support of the argument that this violated the defendant's rights under the confrontation clause of the Sixth Amendment, and the court held that impeachment to show a general lack of trustworthiness based on a prior criminal conviction was not guaranteed by the confrontation clause. *Butler v. State*, 285 Ga. 518, 678 S.E.2d 92 (2009).

**Guilty plea under first-offender inadmissible.**

Defendant's guilty plea to an offense for which she received first-offender treatment should not have been admitted as evidence that she committed a similar independent offense. *Davis v. State*, 269 Ga. 276, 496 S.E.2d 699 (1998).

**First offender record properly admitted.** — Defendant's first offender record was properly considered at his sentencing hearing, and evidence regarding his underlying behavior in connection with the first offender plea was not required. *Williams v. State*, 228 Ga. App. 622, 492 S.E.2d 290 (1997).

**Eligibility for jury duty.** — A prospective juror who had fulfilled probation requirements was eligible under O.C.G.A. § 42-8-62(a) for jury duty in a criminal case. *Griffith v. State*, 286 Ga. App. 859, 650 S.E.2d 413 (2007).

**Sex offender registration as special condition to probation.** — Trial court

did not err in imposing a special requirement on defendant's probation of registration as a sex offender, even though he was sentenced under the First Offender Act, O.C.G.A. § 42-8-60 et seq., as the imposition of that special condition was authorized under the language in § 42-8-62(a) and to rule otherwise would render meaningless the language in § 42-8-62(a) concerning registration requirements. *Evors v. State*, 275 Ga. App. 345, 620 S.E.2d 596 (2005).

**Sex offender registration not required after successful completion of first offender sentence.** — Defendant was not required to register as a sexual offender because the defendant successfully completed a first-offender sentence for statutory rape and burglary charges, and a "conviction" under O.C.G.A. § 42-1-12(a)(8) did not include a discharge without an adjudication of guilt following the successful completion of a first offender sentence; the plain language of O.C.G.A. § 42-8-62(a) provided that, with certain exceptions, once a first offender was discharged without an adjudication of guilt, he or she stood completely exonerated and was not considered as having been convicted of a crime. *Jackson v. State*, 299 Ga. App. 356, 683 S.E.2d 60 (2009).

**Failure to challenge evidence of non-adjudicated crime was ineffective assistance of counsel.** — Defendant's convictions for armed robbery, aggravated assault, and kidnapping of a couple in a residence were reversed on appeal. Evidence that one victim was ordered from a standing to a lying position and that another was dragged around the home was insufficient to establish asportation to support the kidnapping counts. The defendant's convictions for armed robbery and aggravated assault were reversed as the defendant established ineffective assistance of counsel based on trial counsel's failure to object to the inadmissible hearsay statements of two witnesses and the admission of improper impeachment evidence against the defendant regarding a crime for which the defendant was never adjudicated guilty for as a result of being a first offender. *Rayshad v. State*, 295 Ga. App. 29, 670 S.E.2d 849 (2008).



**Cited** in *State v. Allmond*, 225 Ga. App. 509, 484 S.E.2d 306 (1997).

### **42-8-63. Effect of discharge under article on eligibility for employment or appointment to office.**

**Law reviews.** — For article, “Labor and Employment Law,” see 53 Mercer L. Rev. 349 (2001).

### **RESEARCH REFERENCES**

**ALR.** — Judicial expunction of criminal record of convicted adult in absence of authorizing statute, 68 ALR6th 1.

Judicial expunction of criminal record of convicted adult under statute — General principles, and expunction of criminal records under statutes providing for such relief where criminal proceeding is terminated in favor of defendant, upon completion of probation, upon suspended sentence, and where expungement relief predicated upon type, and number, of offenses, 69 ALR6th 1.

Judicial expunction of criminal record of convicted adult under statute — Expunction under statutes addressing “first offenders” and “innocent persons,” where conviction was for minor drug or other offense, where indictment has not been presented against accused or accused has been released from custody, and where court considered impact of *nolle prosequi*, partial dismissal, pardon, rehabilitation, and lesser-included offenses, 70 ALR6th 1.

### **42-8-63.1. Discharges disqualifying individuals from employment.**

(a) A discharge under this article may be used to disqualify a person for employment if:

(1) The offender was discharged under this article on or after July 1, 2004; and either

(2) The employment is with a public school, private school, child welfare agency, or a person or entity that provides day care for minor children or after school care for minor children and the defendant was discharged under this article after prosecution for the offense of child molestation, sexual battery, enticing a child for indecent purposes, sexual exploitation of a child, pimping, pandering, or incest;

(3) The employment is with a long-term care facility as defined in Code Section 31-8-51 or a person or entity that offers day care for elderly persons and the defendant was discharged under this article after prosecution for the offense of sexual battery, incest, pimping, pandering, or a violation of Article 8 of Chapter 5 of Title 16; or

(4) The request for information is an inquiry about a person who has applied for employment with a facility as defined in Code Section 37-3-1 or 37-4-2 that provides services to persons who are mentally ill as defined in Code Section 37-1-1 or developmentally disabled as

defined in Code Section 37-1-1, and the person who is the subject of the inquiry to the center was prosecuted for the offense of sexual battery, incest, pimping, or pandering.

(b) Any discharge under this article may be used to disqualify a person from acquiring or maintaining a peace officer certification as provided for in Chapter 8 of Article 35 and also may disqualify a person from employment in a certified position with a law enforcement unit where the discharge under this article pertained to a felony offense or a crime involving moral turpitude. (Code 1981, § 42-8-63.1, enacted by Ga. L. 2003, p. 840, § 5; Ga. L. 2006, p. 164, § 2/HB 1335; Ga. L. 2009, p. 453, § 3-25/HB 228; Ga. L. 2011, p. 227, § 27/SB 178; Ga. L. 2013, p. 524, § 3-7/HB 78.)

**Effective date.** — This Code section became effective July 1, 2004.

**The 2006 amendment,** effective April 18, 2006, designated the previously existing provisions of this Code section as subsection (a); and added subsection (b).

**The 2009 amendment,** effective July 1, 2009, substituted “Code Section 37-1-1 or developmentally disabled as defined in Code Section 37-1-1” for “Code Section 37-3-1 or mentally retarded as defined in Code Section 37-4-2” in paragraph (a)(4).

**The 2011 amendment,** effective July 1, 2011, inserted “assisted living community,” in paragraph (a)(3).

**The 2013 amendment,** effective July 1, 2013, in paragraph (a)(3), substituted “long-term care facility as defined in Code Section 31-8-51” for “nursing home, assisted living community, personal care home,” near the beginning, and substituted “Article 8 of Chapter 5 of Title 16” for “Code Section 30-5-8” near the end.

**Cross references.** — Circumstances when exonerated first offender’s criminal record may be disclosed, § 35-3-34.1.

**Law reviews.** — For note on the 2003 enactment of this section, see 20 Ga. St. U.L. Rev. 179 (2003).

## **42-8-65. Use of prior finding of guilt in subsequent prosecutions; release of records of discharge; modification of records to reflect conviction; effect of confinement sentence where guilt not adjudicated.**

**Editor’s notes.** — Section 3 of Ga. L. 1985, p. 380, not codified by the General Assembly, provided as follows: “Subsection (d) [now subsection (c)] of Code Section 42-8-65 of the Official Code of Georgia Annotated enacted by Section 2 of this Act shall be repealed upon the ratification of

an amendment to the Constitution extending the jurisdiction of the State Board of Pardons and Paroles to consider cases covered by Code Section 42-8-60.” As of July, 2012, no vote had been taken on such a constitutional amendment.

## **JUDICIAL DECISIONS**

### **Prior prosecution in which defendant given first offender treatment.**

Although the modification of a defendant’s first offender status by the Georgia Crime Information Center was authorized by O.C.G.A. § 42-8-65, it was not a con-

viction because only the trial court that imposed first offender probation was authorized to revoke that status. Thus, as the defendant was not shown to have been adjudicated guilty of the prior crimes, the state improperly impeached the defen-

dant with evidence of the defendant's first offender record. *Lee v. State*, 294 Ga. App. 796, 670 S.E.2d 488 (2008).

**Modification of records pursuant to subsection (b)** is not designed to punish the offender but to maintain an accurate statewide record of offenders and it does not constitute punishment for purposes of double jeopardy analysis. *McKinney v. State*, 240 Ga. App. 812, 525 S.E.2d 395 (1999).

**Use of prior first conviction in recidivist sentencing.** — Where, at the time of a recidivist sentencing, the period of probation on defendant's prior first offender sentence had expired with no revocation, the discharge was automatic and the first offender sentence was not a felony "conviction." The recidivist sentence was thus illegal, and since a challenge to the void sentence was not waived by defendant's failure to object, the sentence was vacated. *Headspeth v. State*, 266 Ga. App. 414, 597 S.E.2d 503 (2004).

**Defendant eligible to serve ordered term of confinement.** — Trial court did not err in denying the defendant's motion to correct an illegal sentence because, in accordance with the plain language of the First Offender Act, O.C.G.A. § 42-8-65(c), during the defendant's term of confinement, the defendant, who pled guilty to first degree cruelty to children, O.C.G.A. § 16-5-70, was deemed to be a convicted felon for purposes of the State-Wide Probation Act, O.C.G.A. § 42-8-35.4, and, consequently, within a category of persons eligible to serve the ordered term of confinement at a probation detention center; the legislature is presumed to have had full knowledge of the First Offender Act when the legislature enacted the State-Wide Probation Act. *Mason v. State*, 310 Ga. App. 118, 712 S.E.2d 76 (2011).

**Cited in** *State v. Allmond*, 225 Ga. App. 509, 484 S.E.2d 306 (1997).

## 42-8-66. Applicability.

The provisions of this article shall not apply to any person who is convicted of a serious violent felony as defined in subsection (a) of Code Section 17-10-6.1. (Code 1981, § 42-8-66, enacted by Ga. L. 1998, p. 180, § 3.)

**Effective date.** — This Code section became effective March 27, 1998.

**Editor's notes.** — Ga. L. 1998, p. 180, § 1, not codified by the General Assembly, provides: "The General Assembly declares and finds: (1) That the 'Sentence Reform Act of 1994,' approved April 20, 1994 (Ga. L. 1994, p. 1959), provided that persons convicted of one of seven serious violent felonies shall serve minimum mandatory terms of imprisonment which shall not otherwise be suspended, stayed, probated, deferred, or withheld by the sentencing court; (2) That in *State v. Allmond*, 225 Ga. App. 509 (1997), the Georgia Court of Appeals held, notwithstanding the 'Sentence Reform Act of 1994,' that the provisions of the First Offender Act would still be available to the sentencing court, which would mean that a person who

committed a serious violent felony could be sentenced to less than the minimum mandatory ten-year sentence; and (3) That, contrary to the decision in *State v. Allmond*, it is the expressed intent of the General Assembly that persons who commit a serious violent felony specified in the 'Sentence Reform Act of 1994' shall be sentenced to a mandatory term of imprisonment of not less than ten years and shall not be eligible for first offender treatment."

**Law reviews.** — For review of 1998 legislation relating to penal institutions, see 15 Ga. St. U.L. Rev. 197 (1998).

For note, "Can't Do the Time, Don't Do the Crime?: Dixon v. State, Statutory Construction, and the Harsh Realities of Mandatory Minimum Sentencing in Georgia," see 22 Ga. St. U.L. Rev. 519 (2005).



## JUDICIAL DECISIONS

**Applicability to offenses committed before 1998.** — Since the serious violent felonies committed by defendant occurred prior to the March 29, 1998, amendment to § 17-10-6.1 and the enactment of O.C.G.A. § 42-8-66, then the prohibition of O.C.G.A. § 42-8-66 had no retroactive application to the defendant to limit the discretion of the trial judge in the sentence to impose. *Camaron v. State*, 246 Ga. App. 80, 539 S.E.2d 577 (2000).

**Sentences for violent felonies.** — The First Offender Act does not apply to the sentences for violent felonies outlined in § 17-10-6.1. *Fleming v. State*, 233 Ga. App. 483, 504 S.E.2d 542 (1998), overruling *State v. Allmond*, 225 Ga. App. 509, 484 S.E.2d 306 (1997).

Defendant found guilty of a serious violent felony under § 17-10-6.1 could apply for first offender status prior to the 1998 amendments to this section and this article. *Fleming v. State*, 271 Ga. 587, 523

S.E.2d 315 (1999), reversing *Fleming v. State*, 233 Ga. App. 483, 504 S.E.2d 542 (1998), reversing *Fleming v. State*, 233 Ga. App. 483, 504 S.E.2d 542 (1998). *Horton v. State*, 241 Ga. App. 605, 527 S.E.2d 254 (1999).

There was no error in the trial court's failure to convict defendant of kidnapping and armed robbery, in violation of O.C.G.A. §§ 16-5-40 and 16-8-41, respectively, under the First Offender Act, as O.C.G.A. § 42-8-66 specifically stated that the Act did not apply to the sentences for violent felonies outlined in O.C.G.A. § 17-10-6.1, and those two crimes were listed as serious violent felonies. *Isaac v. State*, 275 Ga. App. 254, 620 S.E.2d 483 (2005).

**Cited in** *Staley v. State*, 233 Ga. App. 597, 505 S.E.2d 491 (1998); *Burleson v. State*, 233 Ga. App. 769, 505 S.E.2d 515 (1998).

## ARTICLE 4

## PARTICIPATION OF PROBATIONERS IN COMMUNITY SERVICE PROGRAMS

## 42-8-70. Definitions; unlawful to use offender for private gain except under certain circumstances; penalties.

**Law reviews.** — For survey article on local government law, see 60 *Mercer L. Rev.* 263 (2008).

## JUDICIAL DECISIONS

**Cited in** *Currid v. DeKalb State Court Prob. Dep't*, 285 Ga. 184, 674 S.E.2d 894 (2009).

## OPINIONS OF THE ATTORNEY GENERAL

**Use of persons in care of cemeteries.** — Persons sentenced to community service may be utilized to assist counties

or municipalities in the care of abandoned cemeteries or burial grounds. 1999 *Op. Att'y Gen.* No. U99-5.

**42-8-71. Application for participation in community service program; assignment of offenders; violations of court orders or article; limitation of liability.**

**Law reviews.** — For annual survey of local government law, see 58 Mercer L. Rev. 267 (2006).

**JUDICIAL DECISIONS**

**Immunity from liability.** — The first sentence of subsection (d) is construed to mean that immunity is given to any “agency” approved by the court to participate in a community service program or to any “community service officer” appointed by the court. *Department of Human Resources v. Mitchell*, 238 Ga. App. 477, 518 S.E.2d 440 (1999).

Where the Department of Human Resources, an agency under the Community Service Act, was found liable for an injury to a probationer on the basis of the ordinary negligence of the department’s employees, the department was entitled to the immunity granted by subsection (d). *Department of Human Resources v. Mitchell*, 238 Ga. App. 477, 518 S.E.2d 440 (1999).

Immunity extended to Department of Human Resources, an agency under the Community Service Act, was not forfeited by the department’s failure to comply with other requirements of this section relating to application by an agency for participation in a community service program. *Department of Human Resources v. Mitchell*, 238 Ga. App. 477, 518 S.E.2d 440 (1999).

The immunity granted under subsection (d) to agencies approved for participation in community service programs promotes a public policy that was not superseded or repealed by implication by the 1991 constitutional amendment (Ga. Const., Art. I, Sec. II, Par. IX (e)), providing for waiver of the state’s sovereign immunity or by the Georgia Tort Claims Act enacted pursuant to the amendment. *Department of Human Resources v. Mitchell*, 238 Ga. App. 477, 518 S.E.2d 440 (1999).

When a community service participant was assigned to work for the county sanitation department and was killed after

falling from the back of a garbage truck while doing this work, no liability could be assigned for assigning the participant to work for the department, as the department was properly authorized to participate in the community service program, but the facts that the participant was not issued safety shoes issued to department employees and was told to ride on the back of the truck, even though it was going over 10 miles per hour on a busy highway, contrary to department policy, created a fact issue as to the county’s gross negligence, under O.C.G.A. § 51-1-4, and willful misconduct; therefore, the county was not entitled to summary judgment, under O.C.G.A. § 42-8-71(d). *Currid v. DeKalb State Court Prob. Dep’t*, 274 Ga. App. 704, 618 S.E.2d 621 (2005).

When a community service participant was assigned to work for the county sanitation department and was killed after falling from the back of a garbage truck while doing this work, the Department of Corrections and its employee were not shown to be liable, nor was a county employee involved in assigning the participant to work for the sanitation department, as the employees were immune under O.C.G.A. § 42-8-71(d) and a waiver of liability the participant signed. *Currid v. DeKalb State Court Prob. Dep’t*, 274 Ga. App. 704, 618 S.E.2d 621 (2005).

When a decedent fell off a sanitation truck while performing court-ordered community service, sovereign immunity barred a wrongful death claim against a county under the Community Service Act; O.C.G.A. § 42-8-71(d) does not specifically provide either that sovereign immunity is waived or the extent of the waiver, as required by Ga. Const. 1983, Art. I, Sec. II, Para. IX, and the court cannot read such a waiver into the act. *DeKalb State*

Court Prob. Dep't v. Currid, 287 Ga. App. 649, 653 S.E.2d 90 (2007), aff'd, Currid v. DeKalb State Court Prob. Dep't, 285 Ga. 184, 674 S.E.2d 894 (2009).

County did not waive sovereign immunity under O.C.G.A. § 42-8-71(d) of the Community Service Act in a wrongful death action because the plain language

did not expressly waive sovereign immunity or provide for the extent of any waiver. Thus, neither prong of the constitutional test under Ga. Const. 1983, Art. I, Sec. II, Para. IX(e) were met. Currid v. DeKalb State Court Prob. Dep't, 285 Ga. 184, 674 S.E.2d 894 (2009).

**42-8-72. Community service as condition of probation; determination of appropriateness of community service for particular offender; service as live-in attendant for disabled person; community service in lieu of incarceration; community service as discipline.**

(a) Community service may be considered as a condition of probation with primary consideration given to the following categories of offenders:

- (1) Traffic violations;
- (2) Ordinance violations;
- (3) Noninjurious or nondestructive, nonviolent misdemeanors;
- (4) Noninjurious or nondestructive, nonviolent felonies; and
- (5) Other offenders considered upon the discretion of the judge.

(b) The judge may confer with the prosecutor, defense attorney, probation supervisor, community service officer, or other interested persons to determine if the community service program is appropriate for an offender. If community service is ordered as a condition of probation, the court shall order:

(1) Not less than 20 hours nor more than 250 hours in cases involving traffic or ordinance violations or misdemeanors, said service to be completed within one year; or

(2) Not less than 20 hours nor more than 500 hours in felony cases, said service to be completed within three years.

(c)(1) Any agency may recommend to the court that certain disabled persons are in need of a live-in attendant. The judge shall confer with the prosecutor, defense attorney, probation supervisor, community service officer, or other interested persons to determine if a community service program involving a disabled person is appropriate for an offender. If community service as a live-in attendant for a disabled person is deemed appropriate and if both the offender and the disabled person consent to such service, the court may order such live-in community service as a condition of probation but for no longer than two years.



(2) The agency shall be responsible for coordinating the provisions of the cost of food or other necessities for the offender which the disabled person is not able to provide. The agency, with the approval of the court, shall determine a schedule which will provide the offender with certain free hours each week.

(3) Such live-in arrangement shall be terminated by the court upon the request of the offender or the disabled person. Upon termination of such an arrangement, the court shall determine if the offender has met the conditions of probation.

(4) The appropriate agency shall make personal contact with the disabled person on a frequent basis to ensure the safety and welfare of the disabled person.

(d) The judge may order an offender to perform community service hours in a 40 hour per week work detail in lieu of incarceration.

(e) Community service hours may be added to original court ordered hours as a disciplinary action by the court, as an additional requirement of any program in lieu of incarceration, or as part of the sentencing options system as set forth in Article 9 of this chapter. (Ga. L. 1982, p. 1257, § 3; Code 1981, § 42-8-72, enacted by Ga. L. 1982, p. 1257, § 6; Ga. L. 1983, p. 1593, § 2; Ga. L. 1989, p. 331, § 1; Ga. L. 1995, p. 396, § 1; Ga. L. 2004, p. 775, § 6.)

**The 2004 amendment**, effective July 1, 2004, in subsection (e), substituted a comma for “or” in the middle of the subsection, and added “, or as part of the sentencing options system as set forth in Article 9 of this chapter” at the end.

**Editor’s notes.** — Ga. L. 1995, p. 396,

§ 1, which would have amended subsection (a) and added new subsections (f) and (g), was never funded as required by Section 4 of that Act, did not become law, and was repealed on May 14, 2003, by Ga. L. 2003, p. 140, § 42A.

## JUDICIAL DECISIONS

**Sentence held proper.** — Following a conviction for speeding and failure to maintain lane, the defendant was properly sentenced to a fine of \$650 plus court costs, 12 months of probation, 40 hours of community service, and the completion of a defensive driver course, despite the prosecutor’s recommendation of fewer community service hours, because the sentence was authorized by O.C.G.A. § 17-10-3(a)(1), (d)(2) and (d)(4), as well as O.C.G.A. § 42-8-72(a)(1). *Harris v. State*, 272 Ga. App. 650, 613 S.E.2d 170 (2005).

**Amount of community service improper.** — Trial court erred by ordering the defendant to perform 400 hours of community service as a condition of the defendant’s probation because the 250-hour maximum limit for community service hours set forth in O.C.G.A. § 42-8-72(b)(1) specifically applied to cases involving traffic violations, not to each traffic violation or charge. *Jones v. State*, 308 Ga. App. 99, 706 S.E.2d 593 (2011).

## ARTICLE 5

## PRETRIAL RELEASE AND DIVERSION PROGRAMS

**42-8-80. Establishment and operation; rules and regulations.**

The Department of Corrections shall be authorized to establish and operate pretrial release and diversion programs as rehabilitative measures for persons charged with felonies for which bond is permissible under the law in the courts of this state prior to conviction; provided, however, that no such program shall be established in a county without the unanimous approval of the superior court judges, the district attorney, and the sheriff of such county. The Board of Corrections shall promulgate rules and regulations governing any pretrial release and diversion programs established and operated by the department and shall grant authorization for the establishment of such programs based on the availability of sufficient staff and resources. (Code 1981, § 42-8-80, enacted by Ga. L. 1984, p. 367, § 2; Ga. L. 1985, p. 283, § 1; Ga. L. 1996, p. 748, § 23; Ga. L. 2000, p. 1643, § 3.)

**The 2000 amendment**, effective January 1, 2001, in the first sentence, deleted “misdemeanors and” following “persons

charged with” and deleted “the solicitor-general where applicable,” following “the district attorney.”

**42-8-81. Release of person charged to program.**

The court in which a person is charged with a felony for which bond is permissible under the law may, upon the application by the person so charged, at its discretion release the person prior to conviction and upon recognizance to the supervision of a pretrial release or diversion program established and operated by the Department of Corrections after an investigation and upon recommendation of the staff of the pretrial release or diversion program. In no case, however, shall any person be so released unless after consultation with his or her attorney or an attorney made available to the person if he or she is indigent that person has voluntarily agreed to participate in the pretrial release or diversion program and knowingly and intelligently has waived his or her right to a speedy trial for the period of pretrial release or diversion. (Code 1981, § 42-8-81, enacted by Ga. L. 1984, p. 367, § 2; Ga. L. 1985, p. 283, § 1; Ga. L. 1989, p. 14, § 42; Ga. L. 2000, p. 1643, § 4.)

**The 2000 amendment**, effective January 1, 2001, deleted “misdemeanor or”

following “charged with a” in the first sentence.

## ARTICLE 6

## AGREEMENTS FOR PROBATION SERVICES

**42-8-100. Jurisdiction of probation matters in ordinance violation cases; costs; agreements between chief judges of county courts or judges of municipal courts and corporations, enterprises, or agencies for probation services.**

(a) As used in this article, the term:

(1) "Council" means the County and Municipal Probation Advisory Council created under Code Section 42-8-101.

(2) "Private probation officer" means a probation officer employed by a private corporation, private enterprise, private agency, or other private entity that provides probation services.

(3) "Probation officer" means a person employed to supervise defendants placed on probation by a county or municipal court for committing an ordinance violation or misdemeanor.

(b) Any county or municipal court which has original jurisdiction of ordinance violations or misdemeanors and in which the defendant in such a case has been found guilty upon verdict or any plea may, at a time to be determined by the court, hear and determine the question of the probation of such defendant.

(c) If it appears to the court upon a hearing of the matter that the defendant is not likely to engage in an unlawful course of conduct and that the ends of justice and the welfare of society do not require that the defendant shall presently suffer the penalty imposed by law, the court in its discretion shall impose sentence upon the defendant but may stay and suspend the execution of the sentence or any portion thereof or may place him or her on probation under the supervision and control of a probation officer for the duration of such probation, subject to the provisions of this Code section. The period of probation or suspension shall not exceed the maximum sentence of confinement which could be imposed on the defendant.

(d) The court may, in its discretion, require the payment of a fine or costs, or both, as a condition precedent to probation.

(e) The sentencing judge shall not lose jurisdiction over any person placed on probation during the term of his or her probated sentence. The judge is empowered to revoke any or all of the probated sentence, rescind any or all of the sentence, or, in any manner deemed advisable by the judge, modify or change the probated sentence at any time



during the period of time originally prescribed for the probated sentence to run.

(f) If a defendant is placed on probation pursuant to this Code section by a county or municipal court other than one for the county or municipality in which he or she resides for committing any ordinance violation or misdemeanor, such defendant may, when specifically ordered by the court, have his or her probation supervision transferred to the county or municipality in which he or she resides.

(g)(1) The chief judge of any court within the county, with the approval of the governing authority of that county, is authorized to enter into written contracts with corporations, enterprises, or agencies to provide probation supervision, counseling, collection services for all moneys to be paid by a defendant according to the terms of the sentence imposed on the defendant as well as any moneys which by operation of law are to be paid by the defendant in consequence of the conviction, and other probation services for persons convicted in that court and placed on probation in the county. In no case shall a private probation corporation or enterprise be charged with the responsibility for supervising a felony sentence. The final contract negotiated by the chief judge with the private probation entity shall be attached to the approval by the governing authority of the county to privatize probation services as an exhibit thereto. The termination of a contract for probation services as provided for in this subsection entered into on or after July 1, 2001, shall be initiated by the chief judge of the court which entered into the contract, and subject to approval by the governing authority of the county which entered into the contract and in accordance with the agreed upon, written provisions of such contract. The termination of a contract for probation services as provided for in this subsection in existence on July 1, 2001, and which contains no provisions relating to termination of such contract shall be initiated by the chief judge of the court which entered into the contract, and subject to approval by the governing authority of the county which entered into the contract and in accordance with the agreed upon, written provisions of such contract.

(2) The chief judge of any court within the county, with the approval of the governing authority of that county, is authorized to establish a county probation system to provide probation supervision, counseling, collection services for all moneys to be paid by a defendant according to the terms of the sentence imposed on the defendant as well as any moneys which by operation of law are to be paid by the defendant in consequence of the conviction, and other probation services for persons convicted in that court and placed on probation in the county.

(h)(1) The judge of the municipal court of any municipality or consolidated government of a municipality and county of this state,

with the approval of the governing authority of that municipality or consolidated government, is authorized to enter into written contracts with private corporations, enterprises, or agencies to provide probation supervision, counseling, collection services for all moneys to be paid by a defendant according to the terms of the sentence imposed and any moneys which by operation of law are to be paid by the defendant in consequence of the conviction, and other probation services for persons convicted in such court and placed on probation. The final contract negotiated by the judge with the private probation entity shall be attached to the approval by the governing authority of the municipality or consolidated government to privatize probation services as an exhibit thereto.

(2) The judge of the municipal court of any municipality or consolidated government of a municipality and county of this state, with the approval of the governing authority of that municipality or consolidated government, is authorized to establish a probation system to provide probation supervision, counseling, collection services for all moneys to be paid by a defendant according to the terms of the sentence imposed and any moneys which by operation of law are to be paid by the defendant in consequence of the conviction, and other probation services for persons convicted in such court and placed on probation. (Code 1981, § 42-8-100, enacted by Ga. L. 1991, p. 1135, § 2; Ga. L. 1992, p. 3221, § 7; Ga. L. 1995, p. 396, § 2; Ga. L. 1996, p. 1107, § 2; Ga. L. 2000, p. 1554, § 2; Ga. L. 2001, p. 813, § 2; Ga. L. 2006, p. 727, § 2/SB 44.)

**The 2000 amendment**, effective May 1, 2000, added the fourth and fifth sentences in paragraph (1) of subsection (a).

**The 2001 amendment**, effective July 1, 2001, added subsections (a) through (e); redesignated former subsections (a) and (b) as present subsections (f) and (g), respectively; deleted “of a misdemeanor” following “convicted” in the first sentence of paragraph (f)(1) and near the end of paragraph (f)(2); and substituted “2001” for “2000” in two places in paragraph (f)(1).

**The 2006 amendment**, effective May

3, 2006, added subsection (a); redesignated former subsections (a) through (g) as present subsections (b) through (h); in subsection (b), inserted “or misdemeanors” near the beginning, and substituted “any plea” for “plea or has been sentenced upon a plea of nolo contendere,” near the middle; near the end of the first sentence in subsection (c), substituted “officer” for “supervisor”, and near the middle of subsection (f), inserted “or misdemeanor”.

**Law reviews.** — For annual survey of local government law, see 56 Mercer L. Rev. 351 (2004).

## 42-8-101. County and Municipal Probation Advisory Council.

(a) There is created the County and Municipal Probation Advisory Council, to be composed of one superior court judge designated by The Council of Superior Court Judges of Georgia, one state court judge designated by The Council of State Court Judges of Georgia, one municipal court judge designated by the Council of Municipal Court

Judges of Georgia, one sheriff appointed by the Governor, one probate court judge designated by The Council of Probate Court Judges of Georgia, one magistrate designated by the Council of Magistrate Court Judges, the commissioner of corrections or his or her designee, one public probation officer appointed by the Governor, one private probation officer or individual with expertise in private probation services by virtue of his or her training or employment appointed by the Governor, one mayor or member of a municipal governing authority appointed by the Governor, and one county commissioner appointed by the Governor. Members of the council appointed by the Governor shall be appointed for terms of office of four years. With the exceptions of the public probation officer, the county commissioner, the sheriff, the mayor or member of a municipal governing authority, and the commissioner of corrections, each designee or representative shall be employed in their representative capacity in a judicial circuit operating under a contract with a private corporation, enterprise, or agency as provided under Code Section 42-8-100. No person shall serve beyond the time he or she holds the office or employment by reason of which he or she was initially eligible for appointment. In the event of death, resignation, disqualification, or removal for any reason of any member of the council, the vacancy shall be filled in the same manner as the original appointment and any successor shall serve for the unexpired term. Such council shall promulgate rules and regulations regarding contracts or agreements for the provision of probation services and the conduct of business by private entities providing probation services and county, municipal, or consolidated governments establishing probation systems as authorized by this article.

(b) The business of the council shall be conducted in the following manner:

(1) The council shall annually elect a chairperson and a vice chairperson from among its membership. The offices of chairperson and vice chairperson shall be filled in such a manner that they are not held in succeeding years by representatives of the same component (law enforcement, courts, corrections) of the criminal justice system;

(2) The council shall meet at such times and places as it shall determine necessary or convenient to perform its duties. The council shall also meet on the call of the chairperson or at the written request of three of its members;

(3) The council shall maintain minutes of its meetings and such other records as it deems necessary; and

(4) The council shall adopt such rules for the transaction of its business as it shall desire and may appoint such committees as it considers necessary to carry out its business and duties.



(c) Members of the council shall serve without compensation but shall receive the same expense allowance per day as that received by a member of the General Assembly for each day such member of the council is in attendance at a meeting of such council, plus either reimbursement for actual transportation costs while traveling by public carrier or the same mileage allowance for use of a personal motor vehicle in connection with such attendance as members of the General Assembly receive. Payment of such expense and travel allowance shall be subject to availability of funds and shall be in lieu of any per diem, allowance, or other remuneration now received by any such member for such attendance.

(d) The council is assigned to the Administrative Office of the Courts for administrative purposes only in accordance with Code Section 50-4-3. The funds necessary to carry out the provisions of this article shall come from funds appropriated to the Administrative Office of the Courts or otherwise available to the council. The council is authorized to accept and use grants of funds for the purpose of carrying out the provisions of this article.

(e) The council shall have the following powers and duties:

(1) To promulgate rules and regulations for the administration of the council, including rules of procedure for its internal management and control;

(2) To review the uniform professional standards for private probation officers and uniform contract standards for private probation contracts established in Code Section 42-8-102 and submit a report with its recommendations to the General Assembly;

(3) To promulgate rules and regulations to implement those uniform professional standards for probation officers employed by a governing authority of a county, municipality, or consolidated government that has established probation services and uniform agreement standards for the establishment of probation services by a county, municipality, or consolidated government established in Code Section 42-8-102;

(4) To promulgate rules and regulations establishing a 40 hour initial orientation for newly hired private probation officers and for 20 hours per annum of continuing education for private probation officers, provided that the 40 hour initial orientation shall not be required of any person who has successfully completed a probation or parole officer basic course of training certified by the Georgia Peace Officer Standards and Training Council or any private probation officer who has been employed by a private probation corporation, enterprise, or agency for at least six months as of July 1, 1996;

(5) To promulgate rules and regulations establishing a 40 hour initial orientation for probation officers employed by a county, mu-

nicipality, or consolidated government that has established probation services and for 20 hours per annum of continuing education for such probation officers, provided that the 40 hour initial orientation shall not be required of any person who has successfully completed a probation or parole officer basic course of training certified by the Georgia Peace Officer Standards and Training Council or any probation officer who has been employed by a county, municipality, or consolidated government as of March 1, 2006;

(6) To promulgate rules and regulations relative to compliance with the provisions of this article, and enforcement mechanisms that may include, but are not limited to, the imposition of sanctions and fines and the voiding of contracts or agreements;

(7) To promulgate rules and regulations establishing registration for any private corporation, private enterprise, private agency, county, municipality, or consolidated government providing probation services under the provisions of this article, subject to the provisions of Code Section 42-8-107;

(8) To produce an annual summary report. Such report shall not contain information identifying individual private corporations, non-profit corporations, or enterprises or their contracts; and

(9) To promulgate rules and regulations requiring criminal record checks of private probation officers registered under this Code section and establishing procedures for such criminal record checks. The Administrative Office of the Courts on behalf of the council shall conduct a criminal records check for probation officers as provided in Code Section 35-3-34. No applicant shall be registered who has previously been convicted of a felony. The council shall promulgate rules and regulations regarding registration requirements, including restrictions regarding misdemeanor convictions. An agency or private entity shall also be authorized to conduct a criminal history background check of a person employed as a probation officer or an applicant for a probation officer position. The criminal history check may be conducted in accordance with Code Section 35-3-34 and may be based upon the submission of fingerprints of the person whose records are requested. The Georgia Bureau of Investigation shall submit the fingerprints to the Federal Bureau of Investigation under the rules established by the United States Department of Justice for processing and identification of records. The federal record, if any, shall be obtained and returned to the requesting entity or agency. (Code 1981, § 42-8-101, enacted by Ga. L. 1991, p. 1135, § 2; Ga. L. 1992, p. 3221, § 8; Ga. L. 1995, p. 396, § 2; Ga. L. 1996, p. 1107, §§ 3, 4; Ga. L. 1997, p. 692, § 1; Ga. L. 2006, p. 727, § 2/SB 44.)

**The 2006 amendment**, effective May 3, 2006, in the last sentence of subsection (a), inserted “the provision of” and inserted “and county, municipal, or consolidated governments establishing probation systems”; in subsection (d), inserted “in accordance with Code Section 50-4-3” in the first sentence, and inserted “the Administrative Office of the Courts” in the second sentence; added paragraphs (e)(3) and (e)(5); redesignated former paragraph (e)(3) as present paragraph (e)(4), and redesignated former paragraphs (e)(4) through (e)(7) as present paragraphs (e)(6) through (e)(9); in paragraph (e)(6), substituted “compliance with” for “the enforcement of”, substituted “and enforcement mechanisms” for “which enforcement mechanisms”, and added “or agreements” to the end; in paragraph (e)(7), substituted “private enterprise, private agency, county, municipality, or consolidated government” for “enterprise, or agency,” and deleted “of subsection (a)” near the end; in paragraph (e)(9), inserted “registered under this Code section” in the first sentence, substituted “The Adminis-

trative Office of the Courts on behalf of the council shall conduct a criminal records check for probation officers as provided in Code Section 35-3-34.” for “Such rules and regulations shall require a private probation entity to conduct a criminal history records check, as provided in Code Section 35-3-34, for all private probation officers employed by that entity; and to certify the results of such criminal history records check to the council, in such detail as the council may require. Notwithstanding Code Section 35-3-38 or any other provision of law, a private probation entity shall, upon request, communicate criminal history record information on a private probation officer to the Administrative Office of the Courts and the County and Municipal Probation Advisory Council.”; and added the last eight sentences; and deleted subsection (f), which read: “The initial standards, rules, and regulations of the County and Municipal Probation Advisory Council promulgated under this article shall become effective on January 1, 1996.”.

#### **42-8-102. Uniform professional standards and uniform contract standards.**

(a) The uniform professional standards contained in this subsection shall be met by any person employed as and using the title of a private probation officer or probation officer. Any such person shall be at least 21 years of age at the time of appointment to the position of private probation officer or probation officer and must have completed a standard two-year college course or have four years of law enforcement experience; provided, however, that any person employed as a private probation officer as of July 1, 1996, and who had at least six months of experience as a private probation officer or any person employed as a probation officer by a county, municipality, or consolidated government as of March 1, 2006, shall be exempt from such college requirements. Every private probation officer shall receive an initial 40 hours of orientation upon employment and shall receive 20 hours of continuing education per annum as approved by the council, provided that the 40 hour initial orientation shall not be required of any person who has successfully completed a probation or parole officer basic course of training certified by the Peace Officer Standards and Training Council or any private probation officer who has been employed by a private probation corporation, enterprise, or agency for at least six months as of July 1, 1996, or any person employed as a probation officer by a county,



municipality, or consolidated government as of March 1, 2006. In no event shall any person convicted of a felony be employed as a probation officer or utilize the title of probation officer.

(b) The uniform contract standards contained in this subsection shall apply to all private probation contracts executed under the authority of Code Section 42-8-100. The terms of any such contract shall state, at a minimum:

(1) The extent of the services to be rendered by the private corporation or enterprise providing probation supervision;

(2) Any requirements for staff qualifications, to include those contained in this Code section as well as any surpassing those contained in this Code section;

(3) Requirements for criminal record checks of staff in accordance with the rules and regulations established by the council;

(4) Policies and procedures for the training of staff that comply with rules and regulations promulgated by the council;

(5) Bonding of staff and liability insurance coverage;

(6) Staffing levels and standards for offender supervision, including frequency and type of contacts with offenders;

(7) Procedures for handling the collection of all court ordered fines, fees, and restitution;

(8) Procedures for handling indigent offenders to ensure placement of such indigent offenders irrespective of the ability to pay;

(9) Circumstances under which revocation of an offender's probation may be recommended;

(10) Reporting and record-keeping requirements; and

(11) Default and contract termination procedures.

(c) The uniform contract standards contained in this subsection shall apply to all counties, municipalities, and consolidated governments that enter into agreements with a judge to provide probation services under the authority of Code Section 42-8-100. The terms of any such agreement shall state at a minimum:

(1) The extent of the services to be rendered by the local governing authority providing probation services;

(2) Any requirements for staff qualifications, to include those contained in this Code section;

(3) Requirements for criminal record checks of staff in compliance with the rules and regulations established by the council;

(4) Policies and procedures for the training of staff that comply with the rules and regulations established by the council;

(5) Staffing levels and standards for offender supervision, including frequency and type of contacts with offenders;

(6) Procedures for handling the collection of all court ordered fines, fees, and restitution;

(7) Circumstances under which revocation of an offender's probation may be recommended;

(8) Reporting and record-keeping requirements; and

(9) Default and agreement termination procedures.

(d) The council shall review the uniform professional standards and uniform contract and agreement standards contained in subsections (a), (b), and (c) of this Code section and shall submit a report on its findings to the General Assembly. The council shall submit its initial report on or before January 1, 2007, and shall continue such reviews every two years thereafter. Nothing contained in such report shall be considered to authorize or require a change in the standards without action by the General Assembly having the force and effect of law. This report shall provide information which will allow the General Assembly to review the effectiveness of the minimum professional standards and, if necessary, to revise these standards. This subsection shall not be interpreted to prevent the council from making recommendations to the General Assembly prior to its required review and report. (Code 1981, § 42-8-102, enacted by Ga. L. 1992, p. 1465, § 1; Ga. L. 1995, p. 396, § 2; Ga. L. 1996, p. 1107, § 5; Ga. L. 2006, p. 727, § 2/SB 44.)

**The 2006 amendment**, effective May 3, 2006, in subsection (a), inserted "or probation officer" twice, in the second sentence, inserted "or have four years of law enforcement experience", deleted "who is currently" preceding "employed as", substituted "had" for "has" following "and who", and added the language following "probation officer", in the third sentence, substituted "council" for "County and Municipal Probation Advisory Council", and added ", or any person employed as a probation officer by a county, municipality, or consolidated government as of March 1, 2006", and in the fourth sentence, twice deleted "private" preceding "probation"; in subsection (b), substituted "this subsec-

tion" for "this Code section" in the introductory language, in paragraph (b)(3), substituted "council" for "County and Municipal Probation Advisory Council", and in subsection (b)(4), added "that comply with rules and regulations promulgated by the council", added present subsection (c); redesignated former subsection (c) as present subsection (d); and in subsection (d), in the first sentence, substituted "The council" for "The County and Municipal Probation Advisory Council", inserted "and agreement" following "uniform contract", and substituted "(a), (b), and (c)" for "(a) and (b)", and substituted "January 1, 2007" for "July 1, 1997".

**42-8-103. Quarterly report to judge and council; records to be open for inspection.**

(a) Any private corporation, private enterprise, or private agency contracting to provide probation services or any county, municipality or consolidated government entering into an agreement under the provisions of this article shall provide to the judge with whom the contract or agreement was made and the council a quarterly report summarizing the number of offenders under supervision; the amount of fines, statutory surcharges, and restitution collected; the number of offenders for whom supervision or rehabilitation has been terminated and the reason for the termination; and the number of warrants issued during the quarter, in such detail as the council may require.

(b) All records of any private corporation, private enterprise, or private agency contracting to provide services or of any county, municipality, or consolidated government entering into an agreement under the provisions of this article shall be open to inspection upon the request of the affected county, municipality, consolidated government, court, the Department of Audits and Accounts, or the council or its designee. (Code 1981, § 42-8-103, enacted by Ga. L. 1995, p. 396, § 2; Ga. L. 1997, p. 692, § 2; Ga. L. 2006, p. 727, § 2/SB 44.)

**The 2006 amendment**, effective May 3, 2006, rewrote this Code section.

**42-8-104. Conflicts of interests prohibited — private entities.**

(a) No private corporation, private enterprise, or private agency contracting to provide probation services under the provisions of this article nor any employees of such entities shall engage in any other employment, business, or activity which interferes or conflicts with the duties and responsibilities under contracts authorized in this article.

(b) No private corporation, private enterprise, or private agency contracting to provide probation services under the provisions of this article nor its employees shall have personal or business dealings, including the lending of money, with probationers under their supervision.

(c)(1) No private corporation, private enterprise, or private agency contracting to provide probation services under the provisions of this article nor any employees of such entities, shall own, operate, have any financial interest in, be an instructor at, or be employed by any private entity which provides drug or alcohol education services or offers a DUI Alcohol or Drug Use Risk Reduction Program certified by the Department of Driver Services.

(2) No private corporation, private enterprise, or private agency contracting to provide probation services under the provisions of this



article nor any employees of such entities shall specify, directly or indirectly, a particular DUI Alcohol or Drug Use Risk Reduction Program which a probationer may or shall attend. This paragraph shall not prohibit furnishing any probationer, upon request, with the names of certified DUI Alcohol or Drug Use Risk Reduction Programs. Any person violating this paragraph shall be guilty of a misdemeanor. (Code 1981, § 42-8-104, enacted by Ga. L. 1995, p. 396, § 2; Ga. L. 1996, p. 1107, § 6; Ga. L. 2005, p. 334, § 24-2/HB 501; Ga. L. 2006, p. 727, § 2/SB 44.)

**The 2005 amendment**, effective July 1, 2005, substituted "Department of Driver Services" for "Department of Human Resources" in paragraph (c)(1).

**The 2006 amendment**, effective May

3, 2006, inserted "private" preceding "enterprise" and "agency" throughout the Code section; and in paragraph (c)(1), deleted "on or after January 1, 1997," following "provisions of this article".

**42-8-105. Conflicts of interests prohibited — public entities and employees prohibited from engaging in certain employment, business, or other activities that interfere with duties and responsibilities under this article.**

(a) No county, municipality, or consolidated government probation officer or other probation office employee shall engage in any other employment, business, or activity which interferes or conflicts with the officer's or employee's duties and responsibilities under agreements authorized in this article.

(b) No county, municipality, or consolidated government probation officer or other probation office employee shall have personal or business dealings, including the lending of money, with probationers under the supervision of such probation office.

(c)(1) No county, municipality, or consolidated government probation officer or other probation office employee shall own, operate, have any financial interest in, be an instructor at, or be employed by any private entity which provides drug or alcohol education services or offers a DUI Alcohol or Drug Use Risk Reduction Program certified by the Department of Driver Services.

(2) No county, municipality, or consolidated government that provides probation services through agreement under the provisions of this article nor any employees of such shall specify, directly or indirectly, a particular DUI Alcohol or Drug Use Risk Reduction Program which a probationer may or shall attend. This paragraph shall not prohibit furnishing any probationer, upon request, with the names of certified DUI Alcohol or Drug Use Risk Reduction Programs. Any person violating this paragraph shall be guilty of a misdemeanor. (Code 1981, § 42-8-105, enacted by Ga. L. 1995, p. 396, § 2; Ga. L. 2006, p. 727, § 2/SB 44.)

**The 2006 amendment**, effective May 3, 2006 substituted the present provisions of this Code section for the former provisions, which read: "The provisions of this

article shall not affect the ability of local governments to enter into intergovernmental agreements for probation services."

#### **42-8-106. Confidentiality of records.**

(a) All reports, files, records, and papers of whatever kind relative to the supervision of probationers by a private corporation, private enterprise, or private agency contracting under the provisions of this article or by a county, municipality, or consolidated government providing probation services under this article are declared to be confidential and shall be available only to the affected county, municipality, or consolidated government, the judge handling a particular case, the Department of Audits and Accounts, or the council or its designee.

(b) In the event of a transfer of the supervision of a probationer from a private corporation, private enterprise, or private agency or county, municipality, or consolidated government providing probation services under this article to the Department of Corrections, the Department of Corrections shall have access to any relevant reports, files, records, and papers of the transferring entity. All reports, files, records, and papers of whatever kind relative to the supervision of probationers by private corporations, private enterprises, or private agencies under contracts authorized by this article or by a county, municipality, or consolidated government providing probation services under this article shall not be subject to process of subpoena. (Code 1981, § 42-8-106, enacted by Ga. L. 1995, p. 396, § 2; Ga. L. 1997, p. 692, § 3; Ga. L. 2006, p. 727, § 2/SB 44.)

**The 2006 amendment**, effective May 3, 2006 inserted "private" preceding "enterprise" and "agency" throughout the Code section; in subsection (a), near the middle, inserted "or by a county, municipality, or consolidated government providing probation services under this article", and at the end, substituted "council or its designee" for "County and Municipal Pro-

bation Advisory Council"; and in subsection (b), near the middle, inserted "or county, municipality, or consolidated government providing probation services under this article", and near the end, inserted "or by county, municipality, or consolidated government providing probation services under this article".

#### **42-8-107. Registration with council.**

(a)(1) All private corporations, private enterprises, and private agencies contracting or offering to contract for probation services shall register with the council before entering into any contract to provide services. The information included in such registration shall include the name of the corporation, enterprise, or agency, its principal business address and telephone number, the name of its agent for

communication, and other information in such detail as the council may require. No registration fee shall be required.

(2) Any private corporation, private enterprise, or private agency required to register under the provisions of paragraph (1) of this subsection which fails or refuses to do so shall be subject to revocation of any existing contracts, in addition to any other fines or sanctions imposed by the council.

(b)(1) All counties, municipalities, and consolidated governments agreeing or offering to agree to establish a probation system shall register with the council before entering into an agreement with the court to provide services. The information included in such registration shall include the name of the county, municipality, or consolidated government, the principal business address and telephone number, a contact name for communication with the council, and other information in such detail as the council may require. No registration fee shall be required.

(2) Any county, municipality, or consolidated government required to register under the provisions of paragraph (1) of this subsection which fails or refuses to do so shall be subject to revocation of existing agreements, in addition to any other sanctions imposed by the council. (Code 1981, § 42-8-107, enacted by Ga. L. 1995, p. 396, § 2; Ga. L. 1997, p. 692, § 4; Ga. L. 2006, p. 727, § 2/SB 44; Ga. L. 2007, p. 363, § 1/HB 527.)

**The 2006 amendment**, effective May 3, 2006, substituted “council” for “County and Municipal Probation Advisory Council” twice in this Code section; redesignated former subsections (a) and (b) as present paragraphs (a)(1) and (a)(2), in paragraph (a)(1), inserted “private” preceding “enterprises” and “agency”, and deleted the former last sentence, which read:

“No registration fee shall be required.”; in paragraph (a)(2), inserted “private” preceding “enterprise” and “agency”, and substituted “paragraph (1) of this subsection which” for “subsection (a) of this Code section who”; and added subsection (b).

**The 2007 amendment**, effective July 1, 2007, added the last sentence in paragraphs (a)(1) and (b)(1).

**42-8-108. Applicability of article to contractors for probation services; requirements for private corporations, private enterprises and private agencies entering into written contracts for services.**

(a) The probation providers standards contained in this Code section shall be met by private corporations, private enterprises, or private agencies who enter into written contracts for probation services under the authority of Code Section 42-8-100 on or after July 1, 2006. Any private corporation, private enterprise, or private agency which fails to meet the standards established in this subsection on or after July 1, 2006, shall not be eligible to provide probation services in this state. All private corporations, private enterprises, or private agencies who enter



into written contracts for probation services under the authority of Code Section 42-8-100 on or after July 1, 2006, shall:

(1) Meet all requirements as outlined in subsection (b) of Code Section 42-8-102, relating to uniform contract standards;

(2) Not own or control any finance business or lending institution which makes loans to probationers under its supervision for the payment of probation fees or fines; and

(3) Employ at least one person who is responsible for the direct supervision of probation officers employed by the corporation, enterprise, or agency and who shall have at least five years' experience in corrections, parole, or probation services.

(b) The standards contained in this subsection shall be met by all counties, municipalities, or consolidated governments entering into written agreements to provide probation services to any court under the authority of Code Section 42-8-100 on or after July 1, 2006. Any county, municipality, or consolidated government which fails to meet the standards established in this subsection on or after July 1, 2006, shall not be eligible to provide probation services. All counties, municipalities, or consolidated governments which enter into written agreements to provide probation services under the authority of Code Section 42-8-100 on or after July 1, 2006, shall:

(1) Register with the council;

(2) Meet the requirements of subsection (c) of Code Section 42-8-102; and

(3) Employ at least one person who is responsible for the direct supervision of probation officers employed by the governing authority who shall have at least five years' experience in corrections, parole, or probation services; provided, however, that the five-year experience requirement shall not apply to any such supervisor employed by a county, municipality, or consolidated government which was engaged in the provision of probation services on April 15, 2006. (Code 1981, § 42-8-108, enacted by Ga. L. 1996, p. 1107, § 7; Ga. L. 2006, p. 727, § 2/SB 44.)

**The 2006 amendment**, effective May 3, 2006, designated the previously existing provisions of this Code section as subsection (a); in the introductory language of subsection (a), inserted "private" preceding "corporation", "enterprises", and "agencies" throughout, substituted "July 1, 2006" for "January 1, 1997" three times throughout, and substituted "this subsec-

tion" for "this Code section" in the middle of the second sentence; in paragraph (a)(1), substituted the present provisions for the former provisions, which read: "Maintain no less than \$1 million coverage in general liability insurance"; deleted the proviso at the end of paragraph (a)(3); and added subsection (b).

## ARTICLE 7

## IGNITION INTERLOCK DEVICES AS PROBATION CONDITION

**Law reviews.** — For note on 2000 42-8-118, see 17 Ga. St. U.L. Rev. 253 amendments of O.C.G.A. §§ 42-8-110 to (2000).

**42-8-110. Definitions; applicability; purchase or lease of ignition interlock devices by counties, municipalities, or private entities; costs, fees, and deposits; participation by indigents.**

(a) As used in this article, the term “ignition interlock device” means a constant monitoring device certified by the commissioner of driver services which prevents a motor vehicle from being started at any time without first determining the equivalent blood alcohol concentration of the operator through the taking of a deep lung breath sample. The system shall be calibrated so that the motor vehicle may not be started if the blood alcohol concentration of the operator, as measured by the device, exceeds 0.02 grams or if the sample is not a sample of human breath.

(b) As used in this article, the term “provider center” means a facility established for the purpose of providing and installing ignition interlock devices when their use is required by or as a result of an order of a court.

(c) Ignition interlock devices for provider centers may be purchased or leased by counties, municipalities, or private entities.

(d) A provider center shall be authorized to charge the person whose vehicle is to be equipped with an ignition interlock device such installation, deinstallation, and user fees as are approved by the Department of Driver Services. A provider center may also require such person to make a security deposit for the safe return of the ignition interlock device. Payment of any or all of such fees and deposits may be made a condition of probation under this order.

(e) If a county, municipality, or other political subdivision of this state purchases or leases ignition interlock devices from a private entity, such county or municipality shall allow persons who are found by the court to be indigent and unable to pay the fees or deposits for such an ignition interlock device to participate in the ignition interlock program. (Code 1981, § 42-8-110, enacted by Ga. L. 1993, p. 568, § 1; Ga. L. 1997, p. 760, § 26; Ga. L. 1999, p. 391, § 11; Ga. L. 2000, p. 1457, § 6; Ga. L. 2002, p. 415, § 42; Ga. L. 2005, p. 334, § 24-3/HB 501.)

**The 1999 amendment,** effective May 1, 1999, added subsection (e).

**The 2000 amendment,** effective May 1, 2000, in subsection (c), substituted

“may” for “shall” and deleted “pursuant to competitive bidding procedures established by the rules and regulations of the Department of Public Safety” following “entities”; and, in subsection (e), substituted “purchases” for “contracts with a private entity to operate a provider center”, substituted “such county or municipality shall” for “such contract shall include provisions that will” and inserted “an” near the end.

**The 2002 amendment**, effective April 18, 2002, part of an Act to revise, modernize, and correct the Code, substituted “motor vehicle” for “public” in subsection (a) and substituted “Department of Motor Vehicle Safety” for “Department of Public Safety” in subsection (d).

**The 2005 amendment**, effective July 1, 2005, in subsection (a), substituted “commissioner of driver services” for “commissioner of motor vehicle safety” in the first sentence; and in subsection (d), sub-

stituted “Department of Driver Services” for “Department of Motor Vehicle Safety” in the first sentence.

**Editor’s notes.** — Ga. L. 1999, p. 391, § 1, not codified by the General Assembly, provides that: “it is fitting to honor the memory of all victims of drunken driving and Heidi Marie Flye, Cathryn Nicole Flye, and Audrey Marie Flye in particular by strengthening the laws requiring the installation and use of ignition interlock devices.”

Ga. L. 1999, p. 391, § 2, not codified by the General Assembly, provides that: “This Act shall be known and may be cited as ‘Heidi’s Law.’”

**Law reviews.** — For article commenting on the 1997 amendment of this Code section, see 14 Ga. St. U.L. Rev. 203 (1997).

For note on 1999 amendment to this section, see 16 Ga. St. U.L. Rev. 200 (1999).

## RESEARCH REFERENCES

**ALR.** — Validity, construction, and application of ignition interlock laws, 15 ALR6th 375.

### 42-8-111. Court issuance of certificate for installation of ignition interlock devices; exceptions; completion of alcohol and drug use risk reduction program; notice of requirements; fees for driver’s license.

(a) Upon a second or subsequent conviction of a resident of this state for violating Code Section 40-6-391 within five years, as measured from the dates of previous arrests for which convictions were obtained to the date of the current arrest for which a conviction is obtained, for which such person is granted probation, the court shall issue a certificate of eligibility for an ignition interlock device limited driving permit or probationary license, subject to the following conditions:

(1) Such person shall have installed and shall maintain in each motor vehicle registered in such person’s name for a period of not less than one year a functioning, certified ignition interlock device;

(2) Such person shall have installed and shall maintain in any other motor vehicle to be driven by such person for a period of not less than one year a functioning, certified ignition interlock device, and such person shall not drive any motor vehicle whatsoever that is not so equipped during such period. Upon successful completion of one



year of monitoring of such ignition interlock device, the restriction for maintaining and using such ignition interlock device shall be removed, and the permit may be renewed for additional periods of two months as provided in paragraph (1) of subsection (e) of Code Section 40-5-64; and

(3) Such person shall participate in a substance abuse treatment program as defined in paragraph (16.2) of Code Section 40-5-1 or a drug court program in compliance with Code Section 15-1-15 for a period of not less than 120 days.

For the purposes of this subsection, a plea of *nolo contendere* shall constitute a conviction; and a conviction of any offense under the law of another state or territory substantially conforming to any offense under Code Section 40-6-391 shall be deemed a conviction of violating said Code section.

(b) The court may, in its discretion, decline to issue a certificate of eligibility for an ignition interlock device limited driving permit or probationary license for any reason or exempt a person from any or all ignition interlock device requirements upon a determination that such requirements would subject such person to undue financial hardship. Notwithstanding any contrary provision of Code Section 40-13-32 or 40-13-33, a determination of financial hardship may be made at the time of conviction or any time thereafter. If a court grants an exemption from the ignition interlock device requirements, such person shall not be eligible for a limited driving permit or any other driving privilege for a period of one year.

(c) In the case of any person subject to the provisions of subsection (a) of this Code section, the court shall include in the record of conviction or violation submitted to the Department of Driver Services a copy of the certificate of eligibility for an ignition interlock device limited driving permit or probationary license issued by the court or documentation of the court's decision to decline to issue such certificate. Such certificate shall specify any exemption from the installation requirements of paragraph (1) of subsection (a) of this Code section and any vehicles subject to the installation requirements of paragraph (2) of such subsection. The records of the Department of Driver Services shall contain a record reflecting such certificate, and the person's driver's license, limited driving permit, or probationary license shall contain a notation that the person may only operate a motor vehicle equipped with a functioning, certified ignition interlock device.

(d) Except as provided in Code Section 42-8-112, no provision of this article shall be deemed to reduce any period of driver's license suspension or revocation otherwise imposed by law.

(e) The fee for issuance of any driver's license indicating that use of an ignition interlock device is required shall be as prescribed for a

regular driver's license in Code Section 40-5-25, and the fee for issuance of any limited driving permit indicating that use of an ignition interlock device is required shall be as prescribed for a limited driving permit in Code Section 40-5-64; except that, for habitual violators required to use an ignition interlock device as a condition of a probationary license, the fee shall be as prescribed for a probationary license in Code Section 40-5-58.

(f) Exemptions granted due to financial hardship pursuant to paragraph (1) of subsection (a) of this Code section shall be exempt from the subject matter jurisdiction limitations imposed in Code Sections 40-13-32 and 40-13-33. (Code 1981, § 42-8-111, enacted by Ga. L. 1993, p. 568, § 1; Ga. L. 1999, p. 391, § 12; Ga. L. 2000, p. 1457, § 6; Ga. L. 2001, p. 208, § 1-8; Ga. L. 2002, p. 415, § 42; Ga. L. 2003, p. 140, § 42; Ga. L. 2005, p. 334, § 24-4/HB 501; Ga. L. 2011, p. 355, § 19/HB 269; Ga. L. 2012, p. 72, § 6/SB 236; Ga. L. 2012, p. 775, § 42/HB 942; Ga. L. 2013, p. 878, § 3/HB 407.)

**The 1999 amendment**, effective May 1, 1999, in subsection (a), in the first sentence, deleted "within five years, as measured from the dates of previous arrests for which convictions were obtained to the date of the current arrest for which a conviction is obtained," following "Code Section 40-6-391", and substituted "shall" for "may" near the middle; and, in subsection (b), deleted the former last sentence, which read: "Upon a third or subsequent conviction the court shall require installation of a certified ignition interlock device."

**The 2000 amendment**, effective May 1, 2000, rewrote subsection (a), relating to installation of certified ignition interlock device as a condition of probation; designated the former last sentence of subsection (a) as subsection (b); deleted former subsection (b), which read: "Except as otherwise provided in this article, the court may order the installation of a certified ignition interlock device on any vehicle which any person subject to subsection (a) of this Code section owns or operates."; in present subsection (b), substituted "resident of this state" for "person" near the beginning; in subsection (c), designated the former provisions as paragraph (1) and added paragraphs (2) and (3); inserted "or limited driving permit" in the second sentence of paragraph (1) of subsection (c); and, in subsection (e), sub-

stituted the language beginning "as prescribed" and ending "in Code Section 40-5-64;" for "\$15.00," added commas following "except that" and following "probationary license", inserted "for a probationary license" at the end of the first sentence, and deleted the last sentence, which read: "Upon expiration of the period of time for which such person is required to use an ignition interlock device the person may apply for and receive a regular driver's license upon payment of the fee provided for in Code Section 40-5-25."

**The 2001 amendment**, effective July 1, 2001, rewrote subsections (a), (b), and (c) of this Code section.

**The 2002 amendment**, effective April 18, 2002, part of an Act to revise, modernize, and correct the Code, substituted "Department of Motor Vehicle Safety" for "Department of Public Safety" twice in subsection (c).

**The 2003 amendment**, effective May 14, 2003, part of an Act to revise, modernize, and correct the Code, deleted "or its successor agency" following "Motor Vehicle Safety" in two places in subsection (c).

**The 2005 amendment**, effective July 1, 2005, substituted "Department of Driver Services" for "Department of Motor Vehicle Safety" twice in subsection (c).

**The 2011 amendment**, effective January 1, 2012, added subsection (f).

**The 2012 amendments.** — The first 2012 amendment, effective January 1,



2013, rewrote subsections (a) through (c), which read: “(a) In addition to any other provision of probation, upon a second or subsequent conviction of a resident of this state for violating Code Section 40-6-391 within five years, as measured from the dates of previous arrests for which convictions were obtained to the date of the current arrest for which a conviction is obtained, for which such person is granted probation, the court shall order as conditions of probation that:

“(1) Such person shall have installed and shall maintain in each motor vehicle registered in such person’s name throughout the applicable six-month period prescribed by subsection (b) of Code Section 42-8-112 a functioning, certified ignition interlock device, unless the court exempts the person from the requirements of this paragraph based upon the court’s determination that such requirements would subject the person to undue financial hardship; and

“(2) Such person shall have installed and shall maintain in any other motor vehicle to be driven by such person during the applicable six-month period prescribed by subsection (b) of Code Section 42-8-112 a functioning, certified ignition interlock device, and such person shall not during such six-month period drive any motor vehicle whatsoever that is not so equipped.

“For the purposes of this subsection, a plea of nolo contendere shall constitute a conviction; and a conviction of any offense under the law of another state or territory substantially conforming to any offense under Code Section 40-6-391 shall be deemed a conviction of violating said Code section.

“(b) Any resident of this state who is ordered to use an ignition interlock device, as a condition of probation, shall complete the DUI Alcohol or Drug Use Risk Reduction Program and submit to the court or probation department a certificate of completion of the DUI Alcohol or Drug Use Risk Reduction Program and certification of installation of a certified ignition interlock device to the extent required by subsection (a) of this Code section.

“(c) In the case of any person subject to the provisions of subsection (a) of this

Code section, the court shall include in the record of conviction or violation submitted to the Department of Driver Services notice of the requirement for, and the period of the requirement for, the use of a certified ignition interlock device. Such notice shall specify any exemption from the installation requirements of paragraph (1) of subsection (a) of this Code section and any vehicles subject to the installation requirements of paragraph (2) of said subsection. The records of the Department of Driver Services shall contain a record reflecting mandatory use of such device and the person’s driver’s license or limited driving permit shall contain a notation that the person may only operate a motor vehicle equipped with a functioning, certified ignition interlock device.” The second 2012 amendment, effective May 1, 2012, part of an Act to revise, modernize, and correct the Code, revised punctuation in subsection (f).

**The 2013 amendment**, effective July 1, 2013, substituted “one year” for “eight months” in paragraph (a)(1) and twice in paragraph (a)(2); substituted “two months” for “six months” in the last sentence of paragraph (a)(2); and added the third sentence in subsection (b). See editor’s note for applicability.

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2001, a period was added at the end of paragraph (a)(2).

**Cross references.** — Periods of suspension; conditions to return of license, § 40-5-63. Limited driving permits for certain offenders, § 40-5-64.

**Editor’s notes.** — Ga. L. 1999, p. 391, § 1, not codified by the General Assembly, provides that: “it is fitting to honor the memory of all victims of drunken driving and Heidi Marie Flye, Cathryn Nicole Flye, and Audrey Marie Flye in particular by strengthening the laws requiring the installation and use of ignition interlock devices.”

Ga. L. 1999, p. 391, § 2, not codified by the General Assembly, provides that: “This Act shall be known and may be cited as ‘Heidi’s Law.’”

Ga. L. 2013, p. 878, § 5/HB 407, not codified by the General Assembly, provides: “This Act shall become effective on July 1, 2013, and shall apply to offenses committed on or after such date.”



**Law reviews.** — For note on 1999 amendment to this Code section, see 16 Ga. St. U.L. Rev. 200 (1999).

### JUDICIAL DECISIONS

**Imposition of ignition interlock device on second-time DUI offender mandatory.** — O.C.G.A. § 42-8-111 is plain and susceptible of only one natural and reasonable construction, and that is that “shall” means that there is no discretion in the trial court to consider whether to impose an ignition interlock device as a condition of probation for a second time DUI offender, absent a showing of financial hardship; accordingly, a trial court erred in not imposing that condition of probation on defendant, who had previously been convicted of a DUI offense and who entered a negotiated plea to driving under the influence of alcohol to the extent that defendant was a less safe driver

in violation of O.C.G.A. § 30-6-391(a)(1). *State v. Villella*, 266 Ga. App. 499, 597 S.E.2d 563 (2004).

**Failure to order.** — Since defendant’s sentence imposed upon a conviction for driving under the influence was more lenient than permitted under O.C.G.A. § 42-8-111, in that the trial court failed to order defendant to install an ignition interlock device, defendant could not complain on appeal that the trial court erred in failing to order the installation of such a device. *Winstead v. State*, 280 Ga. 605, 632 S.E.2d 86 (2006).

**Cited** in *Hannah v. State*, 280 Ga. App. 230, 633 S.E.2d 800 (2006).

### **42-8-112. Timing for issuance of ignition interlock device limited driving permit; documentation required; reporting requirement.**

(a)(1) In any case where the court grants a certificate of eligibility for an ignition interlock device limited driving permit or probationary license pursuant to Code Section 42-8-111 to a person whose driver’s license is suspended pursuant to subparagraph (b)(2)(C) of Code Section 40-5-57.1 or paragraph (2) of subsection (a) of Code Section 40-5-63, the Department of Driver Services shall not issue an ignition interlock device limited driving permit until after the expiration of 120 days from the date of the conviction for which such certificate was granted.

(2) The Department of Driver Services shall condition issuance of an ignition interlock device limited driving permit for such person upon receipt of acceptable documentation of the following:

(A) That the person to whom such permit is to be issued has completed a DUI Alcohol or Drug Use Risk Reduction Program;

(B) That such person has completed a clinical evaluation as defined in Code Section 40-5-1 and enrolled in a substance abuse treatment program approved by the Department of Human Services or is enrolled in a drug court program;

(C) That such person has installed an ignition interlock device in any vehicle that he or she will be operating; and

(D) A certificate of eligibility for an ignition interlock device limited driving permit or probationary license from the court that sentenced such person for the conviction that resulted in the suspension or revocation of his or her driver's license for which he or she is applying for a limited driving permit or probationary license.

(b)(1) In any case where the court grants a certificate of eligibility for an ignition interlock device limited driving permit or probationary license pursuant to Code Section 42-8-111 to a person whose driver's license is revoked as a habitual violator pursuant to Code Section 40-5-58, the Department of Driver Services shall not issue a habitual violator probationary license until after the expiration of two years from the date of the conviction for which such certificate was granted.

(2) The Department of Driver Services shall condition issuance of a habitual violator probationary license for such person upon receipt of acceptable documentation of the following:

(A) That the person to whom such probationary license is to be issued has completed a DUI Alcohol or Drug Use Risk Reduction Program;

(B) That such person has completed a clinical evaluation as defined in Code Section 40-5-1 and enrolled in a substance abuse treatment program approved by the Department of Human Services or is enrolled in a drug court program;

(C) That such person has installed an ignition interlock device in any vehicle that he or she will be operating; and

(D) A certificate of eligibility for an ignition interlock device limited driving permit or probationary license from the court that sentenced such person for the conviction that resulted in the suspension or revocation of his or her driver's license for which he or she is applying for a limited driving permit or probationary license.

(3) In any case where installation of an ignition interlock device is required, failure to show proof of such device shall be grounds for refusal of reinstatement of such license or issuance of such habitual violator's probationary license or the immediate suspension or revocation of such license.

(4) Any limited driving permit or probationary license issued to such person shall bear a restriction reflecting that the person may only operate a motor vehicle equipped with a functional ignition interlock device. No person whose limited driving permit or probationary license contains such restriction shall operate a motor vehicle that is not equipped with a functional ignition interlock device.

(5)(A) Any person who has been issued an ignition interlock device limited driving permit or a habitual violator probationary license bearing an ignition interlock device condition shall maintain such ignition interlock device in any motor vehicle he or she operates to the extent required by the certificate of eligibility for such permit or probationary license issued to such person by the court in which he or she was convicted for not less than one year.

(B) Upon the expiration of such one-year ignition interlock device limited driving permit or habitual violator probationary license, the driver may, if otherwise qualified, apply for renewal of such permit or probationary license without such ignition interlock device restriction.

(c) Each resident of this state who is required to have an ignition interlock device installed pursuant to this article shall report to the provider center every 30 days for the purpose of monitoring the operation of each required ignition interlock device. If at any time it is determined that a person has tampered with the device, the Department of Driver Services shall be given written notice within five days by the probation officer, the court ordering the use of such device, or the interlock provider. If an ignition interlock device is found to be malfunctioning, it shall be replaced or repaired, as ordered by the court or the Department of Driver Services, at the expense of the provider.

(d)(1) If a person required to report to an ignition interlock provider as required by subsection (c) of this Code section fails to report to the provider as required or receives an unsatisfactory report from the provider at any time during the one-year period, the Department of Driver Services shall revoke such person's ignition interlock device limited driving permit immediately upon notification from the provider of the failure to report or failure to receive a satisfactory report. Except as provided in paragraph (2) of this subsection, within 30 days after such revocation, the person may make a written request for a hearing and remit to the department a payment of \$250.00 for the cost of the hearing. Within 30 days after receiving a written request for a hearing and a payment of \$250.00, the Department of Driver Services shall hold a hearing as provided in Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." The hearing shall be recorded.

(2) Any person whose ignition interlock device limited driving permit was revoked on or before July 1, 2004, for failure to report or failure to receive a satisfactory report may make a written request for a hearing and remit to the department a payment of \$250.00 for the cost of the hearing. Within 30 days after receiving a written request for a hearing and a payment of \$250.00, the Department of Driver Services shall hold a hearing as provided in Chapter 13 of Title 50,



the “Georgia Administrative Procedure Act.” The hearing shall be recorded.

(3) If the hearing officer determines that the person failed to report to the ignition interlock provider for any of the reasons specified in this paragraph, the Department of Driver Services shall issue a new ignition interlock device limited driving permit that shall be valid for a period of one year to such person. Such reasons shall be for providential cause and shall include, but not be limited to, the following:

(A) Medical necessity, as evidenced by a written statement from a medical doctor;

(B) The person was incarcerated;

(C) The person was required to be on the job at his or her place of employment, with proof that the person would be terminated if he or she was not at work; or

(D) The vehicle with the installed interlock device was rendered inoperable by reason of collision, fire, or a major mechanical failure.

(4) If the hearing officer determines that the person failed to report to the ignition interlock provider for any reason other than those specified in paragraph (3) of this subsection, or if the person received an unsatisfactory report from the provider, after the expiration of 120 days the person may apply to the department and the department shall issue a new ignition interlock device limited driving permit to such person.

(5) This subsection shall not apply to any person convicted of violating Code Section 42-8-118. (Code 1981, § 42-8-112, enacted by Ga. L. 1993, p. 568, § 1; Ga. L. 2000, p. 1457, § 6; Ga. L. 2001, p. 208, § 1-9; Ga. L. 2002, p. 415, § 42; Ga. L. 2003, p. 796, § 8; Ga. L. 2004, p. 604, § 1; Ga. L. 2005, p. 60, § 42/HB 95; Ga. L. 2005, p. 334, § 24-5/HB 501; Ga. L. 2012, p. 72, § 7/SB 236; Ga. L. 2013, p. 878, § 4/HB 407.)

**The 2000 amendment**, effective May 1, 2000, in subsection (a), in the first sentence, substituted “In any case where” for “If”, substituted “resident of this state” for “person”, inserted “surrender his or her driver’s license to the court immediately and”, inserted “and obtain an ignition interlock device restricted driving license”, added the second sentence, and, in the third sentence, substituted “such person” for “the person” and inserted “and receipt of the restricted driving license”;

in subsection (b), designated the existing provisions as paragraphs (1) through (4) respectively; in paragraph (1) of subsection (b), substituted “In any case where” for “If” and, substituted “resident of this state” for “person” in the first sentence, and, in the second sentence, substituted “such person” for “the person” and substituted “the period required by this subsection” for “such period”; rewrote paragraphs (2) and (3) of subsection (b); inserted “In any case where use of an

ignition interlock device is required, failure" in paragraph (4) of subsection (b); and, in subsection (c), substituted "resident of this state" for "person" in the first sentence, and, in the second sentence, substituted "probation officer" for "Department of Public Safety" and inserted "or, in the case of a driver who is not on probation, the Department of Public Safety".

**The 2001 amendment**, effective July 1, 2001, inserted "to the extent required by subsection (a) of Code Section 42-8-111" in the last sentence of subsection (a); in subsection (b), in paragraph (1), in the first sentence, inserted "or its successor agency", inserted "ten days after", substituted "person first becomes eligible ... whichever is applicable" for "suspension or revocation concludes", and, in the second sentence, inserted "to the extent required by subsection (a) of Code Section 42-8-111", deleted "the department shall not reinstate such person's driver's license and," preceding "absent a finding", and added "if such is still applicable", in paragraph (2), in the first sentence, deleted "installation and" preceding "use of an", inserted "or vehicles to the extent required by subsection (a) of Code Section 42-8-111" and substituted "a vehicle or vehicles to the extent required by subsection (a) of Code Section 42-8-111" for "his or her vehicle" and substituted "12 months" for "120 days" in the second sentence, in the first sentence of paragraph (3), deleted "installation and" preceding "use", substituted "and maintained" for "shall maintain such device", inserted "or vehicles to the extent required by subsection (a) of Code Section 42-8-111", inserted "such person", and substituted "installation" for "use" in paragraph (4); and, in subsection (c), in the first sentence, substituted "have" for "use", inserted "installed", and substituted "required ignition interlock device" for "interlocking ignition device in the person's vehicle or vehicles", and inserted "or its successor agency" in the second and third sentences.

**The 2002 amendment**, effective April 18, 2002, part of an Act to revise, modernize, and correct the Code, substituted "Department of Motor Vehicle Safety" for "Department of Public Safety or its successor

agency" in paragraph (b)(1) and twice in subsection (c).

**The 2003 amendment**, effective July 1, 2003, in the second sentence of subsection (c), deleted "the probation officer or the court ordering use of such device or, in the case of a driver who is not on probation," following "with the device," and added "by the probation officer, the court ordering the use of such device, or the interlock provider" at the end.

**The 2004 amendment**, effective July 1, 2004, added subsection (d).

**The 2005 amendments.** — The first 2005 amendment, effective April 7, 2005, part of an Act to revise, modernize, and correct the Code, revised punctuation in paragraph (d)(1). The second 2005 amendment, effective July 1, 2005, substituted "Department of Driver Services" for "Department of Motor Vehicle Safety" in subsections (b), (c), and (d).

**The 2012 amendment**, effective January 1, 2013, substituted the present provisions of subsections (a) and (b) for the former provisions, which read: "(a) In any case where the court imposes the use of an ignition interlock device as a condition of probation on a resident of this state whose driving privilege is not suspended or revoked, the court shall require the person to surrender his or her driver's license to the court immediately and provide proof of compliance with such order to the court or the probation officer and obtain an ignition interlock device restricted driving license within 30 days. Upon expiration of the period of time for which such person is required to use an ignition interlock device, the person may apply for and receive a regular driver's license upon payment of the fee provided for in Code Section 40-5-25. If such person fails to provide proof of installation to the extent required by subsection (a) of Code Section 42-8-111 and receipt of the restricted driving license within such period, absent a finding by the court of good cause for that failure, which finding is entered in the court's record, the court shall revoke or terminate the probation.

"(b)(1) In any case where the court imposes the use of an ignition interlock device as a condition of probation on a resident of this state whose driving privilege



is suspended or revoked, the court shall require the person to provide proof of compliance with such order to the court or the probation officer and the Department of Driver Services not later than ten days after the date on which such person first becomes eligible to apply for an ignition interlock device limited driving permit in accordance with paragraph (2) of this subsection or a habitual violator's probationary license in accordance with paragraph (3) of this subsection, whichever is applicable. If such person fails to provide proof of installation to the extent required by subsection (a) of Code Section 42-8-111 within the period required by this subsection, absent a finding by the court of good cause for that failure, which finding is entered on the court's record, the court shall revoke or terminate the probation if such is still applicable.

"(2) If the person subject to court ordered use of an ignition interlock device as a condition of probation is authorized under Code Section 40-5-63 or 40-5-67.2 to apply for reinstatement of his or her driver's license during the period of suspension, such person shall, prior to applying for reinstatement of the license, have an ignition interlock device installed and shall maintain such ignition interlock device in a motor vehicle or vehicles to the extent required by subsection (a) of Code Section 42-8-111 for a period of six months running concurrently with that of an ignition interlock device limited driving permit, which permit shall not be issued until such person submits to the department proof of completion of a DUI Alcohol or Drug Use Risk Reduction Program, proof of having undergone any clinical evaluation and of having enrolled in any substance abuse treatment program required by Code Section 40-5-63.1, and proof of installation of an ignition interlock device on a vehicle or vehicles to the extent required by subsection (a) of Code Section 42-8-111. Such a person may apply for and be issued an ignition interlock device limited driving permit at the end of 12 months after the suspension of the driver's license. At the expiration of such six-month ignition interlock device limited driving permit, the driver may, if otherwise qualified, apply for reinstatement

of a regular driver's license upon payment of the fee provided in Code Section 40-5-25.

"(3) If the person subject to court ordered use of an ignition interlock device as a condition of probation is authorized under Code Section 40-5-58 or under Code Section 40-5-67.2 to obtain a habitual violator's probationary license, such person shall, if such person is a habitual violator as a result of two or more convictions for driving under the influence of alcohol or drugs, have an ignition interlock device installed and maintained in a motor vehicle or vehicles to the extent required by subsection (a) of Code Section 42-8-111 for a period of six months following issuance of the probationary license, and such person shall not during such six-month period drive any motor vehicle that is not so equipped, all as conditions of such probationary license. Following expiration of such six-month period with no violation of the conditions of the probationary license, the person may apply for a habitual violator probationary license without such ignition interlock device condition.

"(4) In any case where installation of an ignition interlock device is required, failure to show proof of such device shall be grounds for refusal of reinstatement of such license or issuance of such habitual violator's probationary license or the immediate suspension or revocation of such license."

**The 2013 amendment**, effective July 1, 2013, in subsection (b), inserted "probationary" in the middle of subparagraph (b)(2)(A), substituted "one year" for "eight months" at the end of subparagraph (b)(5)(A), and substituted "one-year" for "eight-month" near the beginning of subparagraph (b)(5)(B); substituted "one-year" for "six-month" in the first sentence of paragraph (d)(1); in the introductory paragraph of paragraph (d)(3), substituted "specified in this paragraph" for "specified below" in the first sentence, inserted "shall" near the end of the second sentence, and substituted "one year" for "six months". See editor's note for applicability.

**Cross references.** — Clinical evaluation and substance abuse treatment programs for certain offenders, § 40-5-63.1.



Limited driving permits for certain offenders, § 40-5-64.

**Editor's notes.** — Ga. L. 2013, p. 878, § 5/HB 407, not codified by the General

Assembly, provides: "This Act shall become effective on July 1, 2013, and shall apply to offenses committed on or after such date."

### JUDICIAL DECISIONS

**Cited** in *Hannah v. State*, 280 Ga. App. 230, 633 S.E.2d 800 (2006).

#### **42-8-113. Renting, leasing, or lending motor vehicle to probationer subject to this article prohibited.**

(a) No person shall knowingly rent, lease, or lend a motor vehicle to a person known to have had his or her driving privilege restricted as provided in this article, unless the vehicle is equipped with a functioning, certified ignition interlock device. Any person whose driving privilege is restricted as provided in this article shall notify any other person who rents, leases, or loans a motor vehicle to him or her of such driving restriction.

(b) Any person convicted of a violation of subsection (a) of this Code section shall be guilty of a misdemeanor. (Code 1981, § 42-8-113, enacted by Ga. L. 1993, p. 568, § 1; Ga. L. 2000, p. 1457, § 6; Ga. L. 2012, p. 72, § 8/SB 236.)

**The 2012 amendment**, effective January 1, 2013, in subsection (a), twice deleted "as a condition of probation" following "restricted" in the first and second sentences.

**Editor's notes.** — Ga. L. 2000, p. 1457, § 6, effective May 1, 2000, reenacted this Code section without change.

#### **42-8-114. Specifying provider for ignition interlock device.**

(a) No judicial officer, probation officer, law enforcement officer, or other officer or employee of a court; person who owns, operates, or is employed by a private company which has contracted to provide private probation services for misdemeanor cases; or professional bondsman or agent or employee thereof shall specify, directly or indirectly, a particular provider center which the person may or shall utilize when use of an ignition interlock device is required. This subsection shall not prohibit any judicial officer, probation officer, law enforcement officer, or other officer or employee of a court; owner, operator, or employee of a private company which has contracted to provide probation services for misdemeanor cases; or professional bondsman or agent or employee thereof from furnishing any person, upon request, the names of certified provider centers.

(b) No person who owns, operates, or is employed by a private company which has contracted to provide probation services for misde-

meanor cases or professional bondsman or agent or employee thereof shall be authorized to own, operate, or be employed by a provider center. (Code 1981, § 42-8-114, enacted by Ga. L. 1993, p. 568, § 1; Ga. L. 2000, p. 1457, § 6.)

**The 2000 amendment**, effective May 1, 2000, substituted the present provisions for the former, which read: “(a) Notwithstanding Code Sections 42-8-110 through 42-8-113, if a person who is required to use an ignition interlock device pursuant to this article is required to operate a motor vehicle in the course and scope of his or her employment and if the vehicle is owned by the employer, the person may operate that vehicle without installation of an approved ignition interlock device if the employer has been noti-

fied by the person that the person’s driving privilege has been restricted under this article and if the person has proof of that notification in his or her possession or the notice, or a facsimile copy thereof, is with the vehicle.

“(b) A motor vehicle owned by a business entity, which business entity is all or partly owned or controlled by a person otherwise subject to this article, is not a motor vehicle owned by the employer subject to the exemption in subsection (a) of this Code section.”

#### 42-8-115. Certification of ignition interlock devices.

(a) The commissioner of driver services or the commissioner’s designee shall certify ignition interlock devices required by this article and the providers of such devices and shall promulgate rules and regulations for the certification of said devices and providers. The standards for certification of such devices shall include, but not be limited to, those standards for such devices promulgated by the National Highway Traffic Safety Administration and adopted by rule or regulation of the Department of Driver Services.

(b) The commissioner of driver services may utilize information from an independent agency to certify ignition interlock devices on or off the premises of the manufacturer in accordance with rules and regulations promulgated pursuant to this article. The cost of certification shall be borne by the manufacturers of ignition interlock devices.

(c) The commissioner of driver services shall adopt rules and regulations for determining the accuracy of and proper use of the ignition interlock devices in full compliance with this article. No model of ignition interlock device shall be certified unless it meets the accuracy requirements specified by such rules and regulations. (Code 1981, § 42-8-115, enacted by Ga. L. 1993, p. 568, § 1; Ga. L. 2000, p. 1457, § 6; Ga. L. 2002, p. 415, § 42; Ga. L. 2005, p. 334, § 24-6/HB 501.)

**The 2000 amendment**, effective May 1, 2000, rewrote subsection (a) and deleted subsection (d), which read: “Before certifying any device, the Department of Public Safety shall consult with the National Highway Traffic Safety Administra-

tion regarding the use of ignition interlock devices.”

**The 2002 amendment**, effective April 18, 2002, part of an Act to revise, modernize, and correct the Code, substituted “commissioner of motor vehicle safety” for

“commissioner of public safety” throughout this Code section, and substituted “Department of Motor Vehicle Safety” for “Department of Public Safety” in subsection (a).

**The 2005 amendment**, effective July 1, 2005, in subsection (a), substituted “commissioner of driver services” for “com-

missioner of motor vehicle safety” in the first sentence and substituted “Department of Driver Services” for “Department of Motor Vehicle Safety” in the second sentence; and in subsections (b) and (c), substituted “commissioner of driver services” for “commissioner of motor vehicle safety”.

## 42-8-116. Warning labels.

The providers certified by the Department of Driver Services shall design and adopt pursuant to regulations of the department a warning label which shall be affixed to each ignition interlock device upon installation. The label shall contain a warning that any person tampering, circumventing, or otherwise misusing the device is guilty of a misdemeanor and may be subject to civil liability. (Code 1981, § 42-8-116, enacted by Ga. L. 1993, p. 568, § 1; Ga. L. 2000, p. 1457, § 6; Ga. L. 2002, p. 415, § 42; Ga. L. 2005, p. 334, § 24-7/HB 501.)

**The 2002 amendment**, effective April 18, 2002, part of an Act to revise, modernize, and correct the Code, substituted “Department of Motor Vehicle Safety” for “Department of Public Safety”.

**The 2005 amendment**, effective July 1, 2005, substituted “Department of

Driver Services” for “Department of Motor Vehicle Safety” in the first sentence in this Code section.

**Editor’s notes.** — Ga. L. 2000, p. 1457, § 6, effective May 1, 2000, reenacted this Code section without change.

### 42-8-116.1. Effect of failing to comply; previously installed devices.

Any other or former provision of this article notwithstanding:

(1) The failure to install an ignition interlock device pursuant to an order of probation granted on or after May 1, 1999, but prior to May 1, 2000, shall not be ground for suspension or revocation of driving privileges, revocation of probation, refusal to issue a probationary driver’s license, or refusal to reinstate a driver’s license for the person granted such probation unless the order granting such probation unequivocally conditioned probation upon the installation of an ignition interlock device; and

(2) In the case of any person who had installed and maintained an ignition interlock device in a motor vehicle for a period of six months pursuant to any order of probation granted on or after May 1, 1999, but prior to May 1, 2000, any lack of certification of such ignition interlock device or of the provider center for such device or lack of a limited driving permit for the period of use of such device shall not be ground for suspension or revocation of driving privileges, revocation of probation, refusal to issue a probationary driver’s license, or



refusal to reinstate a driver's license for the person subject to such order if such installation and the monitoring required by this article for the required period of maintenance is confirmed in writing by the provider center for such device. (Code 1981, § 42-8-116.1, enacted by Ga. L. 2000, p. 1457, § 6; Ga. L. 2001, p. 4, § 42.)

**Effective date.** — This Code section became effective May 1, 2000.

**The 2001 amendment,** effective February 12, 2001, part of an Act to revise, modernize, and correct the Code, substituted “May 1, 2000,” for “the effective date of this Code section” in paragraph (1).

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2000 and in 2001, “May 1, 2000” was substituted for “the effective date of this Code section” in paragraphs (1) and (2).

### **42-8-117. Revocation of driving privilege upon violation of probation imposed by Code Section 42-8-111.**

(a)(1) In the event the sentencing court revokes a person's probation after finding that such person has violated the terms of the certificate of eligibility for an ignition interlock device limited driving permit or probationary license issued pursuant to subsection (a) of Code Section 42-8-111, the Department of Driver Services shall revoke that person's driving privilege for one year from the date the court revokes that person's probation. The court shall report such probation revocation to the Department of Driver Services by court order.

(2) This subsection shall not apply to any person whose limited driving permit has been revoked under subsection (d) of Code Section 42-8-112.

(b) In the event the sentencing court revokes a person's probation after finding that such person has twice violated the terms of the certificate of eligibility for an ignition interlock device limited driving permit or probationary license issued pursuant to subsection (a) of Code Section 42-8-111 during the same period of probation, the Department of Driver Services shall revoke that person's driving privilege for five years from the date the court revokes that person's probation for a second time. The court shall report such probation revocation to the Department of Driver Services by court order. (Code 1981, § 42-8-117, enacted by Ga. L. 1993, p. 568, § 1; Ga. L. 2000, p. 1457, § 6; Ga. L. 2002, p. 415, § 42; Ga. L. 2004, p. 604, § 2; Ga. L. 2005, p. 334, § 24-8/HB 501; Ga. L. 2012, p. 72, § 9/SB 236.)

**The 2000 amendment,** effective May 1, 2000, deleted “or the Department of Public Safety” following “In the event the sentencing court” in the first sentences of subsections (a) and (b).

**The 2002 amendment,** effective April

18, 2002, part of an Act to revise, modernize, and correct the Code, substituted “Department of Motor Vehicle Safety” for “Department of Public Safety” throughout this Code section.

**The 2004 amendment,** effective July

1, 2004, in subsection (a), designated the existing provisions as paragraph (a)(1) and added paragraph (a)(2).

**The 2005 amendment**, effective July 1, 2005, substituted “Department of Driver Services” for “Department of Motor Vehicle Safety” throughout this Code section.

**The 2012 amendment**, effective Janu-

ary 1, 2013, in the first sentence of paragraph (a)(1) and the first sentence of subsection (b), substituted “revokes a person’s probation after finding that such person” for “finds that a person” and substituted “the certificate of eligibility for an ignition interlock device limited driving permit or probationary license issued” for “probation imposed”.

## **42-8-118. Requesting or soliciting another to blow into device; tampering with or circumventing operation of device.**

**Editor’s notes.** — Ga. L. 2000, p. 1457, § 6, effective May 1, 2000, reenacted this Code section without change.

## ARTICLE 8

### DIVERSION CENTER AND PROGRAM

## **42-8-130. Establishment; obligations of respondent; confinement; fee; alternative methods of incarceration.**

### JUDICIAL DECISIONS

#### **Revocation of work release proper.**

— In light of a father’s failure to comply with the requirements of O.C.G.A. § 42-8-130, the statute authorized the trial court to revoke the father’s work release status; the father brought paperwork to the office of a superior court judge during the hours that the father was sup-

posed to be at work, and pursuant to § 42-8-130, the father was not authorized to be anywhere else besides the detention center, the father’s place of employment, or traveling to and from the father’s place of employment. *Cross v. Ivester*, 315 Ga. App. 760, 728 S.E.2d 299 (2012).

## ARTICLE 9

### PROBATION MANAGEMENT

**Effective date.** — This article became effective April 21, 2009.

**Editor’s notes.** — The former article also pertained to probation management and was repealed on its own terms, effective June 30, 2008. The former article

consisted of Code Sections 42-8-150 through 42-8-160 and was based on Code 1981, §§ 42-8-150 through 42-8-160, enacted by Ga. L. 2004, p. 775, § 7; Ga. L. 2005, p. 60, § 42/HB 95; Ga. L. 2006, p. 425, § 2/HB 692.

## **42-8-150. Short title.**

This article shall be known and may be cited as the “Probation Management Act.” (Code 1981, § 42-8-150, enacted by Ga. L. 2009, p. 32, § 1/SB 24.)

**42-8-151. Definitions.**

For purposes of this article, the term:

(1) "Chief probation officer" means the highest ranking field probation officer in each judicial circuit.

(2) "Commissioner" means the commissioner of corrections.

(3) "Department" means the Department of Corrections.

(4) "Electronic monitoring" means supervising, mapping, or tracking the location of a probationer by means including electronic surveillance, voice recognition, facial recognition, fingerprinting or biometric scan, automated kiosk, automobile ignition interlock device, or global positioning systems which may coordinate data with crime scene information.

(5) "Hearing officer" means an impartial department employee or representative who has been selected and appointed to hear alleged cases regarding violations of probation for administrative sanctioning.

(6) "Initial sanction" means the sanction set by the judge upon initial sentencing.

(7) "Intensive probation" means a level of probation supervision which includes, but is not limited to, curfews, community service, drug testing, program participation, special conditions of probation, and general conditions of probation as set forth in Code Section 42-8-35.

(8) "Options system day reporting center" means a state facility providing supervision of probationers which includes, but is not limited to, mandatory reporting, program participation, drug testing, community service, all special conditions of probation, and general conditions of probation as set forth in Code Section 42-8-35.

(9) "Options system probationer" means a probationer who has been sentenced to the sentencing options system.

(10) "Probation supervision" means a level of probation supervision which includes, but is not limited to, general conditions of probation as set forth in Code Section 42-8-35 and all special conditions of probation.

(11) "Residential substance abuse treatment facility" means a state correctional facility that provides inpatient treatment for alcohol and drug abuse.

(12) "Sentencing options system" means a continuum of sanctions for probationers that includes the sanctions set forth in subsection (c)



of Code Section 42-8-153. (Code 1981, § 42-8-151, enacted by Ga. L. 2009, p. 32, § 1/SB 24; Ga. L. 2010, p. 878, § 42/HB 1387.)

**The 2010 amendment**, effective June 3, 2010, part of an Act to revise, modernize, and correct the Code, redesignated former paragraph (1) as present paragraph (2) and redesignated former paragraph (2) as present paragraph (1) to arrange the definitions in alphabetical order.

#### **42-8-152. Sentencing options systems; retention of jurisdiction by court.**

(a) In addition to any other terms or conditions of probation provided for under this chapter, the trial judge may require that defendants who are sentenced to probation pursuant to subsection (c) of Code Section 42-8-34 be ordered to the sentencing options system.

(b) Where a defendant has been ordered to the sentencing options system, the court shall retain jurisdiction throughout the period of the probated sentence as provided in subsection (g) of Code Section 42-8-34, and may modify or revoke any part of a probated sentence as provided in Code Section 42-8-34.1 and subsection (c) of Code Section 42-8-38. (Code 1981, § 42-8-152, enacted by Ga. L. 2009, p. 32, § 1/SB 24.)

#### **42-8-153. System of administrative sanctions.**

(a) The department is authorized to establish by rules and regulations a system of administrative sanctions as an alternative to judicial modifications or revocations for probationers who violate the terms and conditions of the sentencing options system established under this article. The department may not, however, sanction probationers for violations of special conditions of probation or general conditions of probation for which the sentencing judge has expressed an intention that such violations be heard by the court pursuant to Code Section 42-8-34.1.

(b) The department shall only impose restrictions which are equal to or less restrictive than the sanction cap set by the sentencing judge.

(c) The administrative sanctions which may be imposed by the department are as follows, from most restrictive to least restrictive:

- (1) Probation detention center or residential substance abuse treatment facility;
- (2) Probation boot camp;
- (3) Department of Corrections day reporting center;
- (4) Intensive probation;
- (5) Electronic monitoring;

(6) Community service; or

(7) Probation supervision.

(d) The department may order offenders sanctioned pursuant to paragraphs (1) through (3) of subsection (c) of this Code section to be held in the local jail until transported to a designated facility. (Code 1981, § 42-8-153, enacted by Ga. L. 2009, p. 32, § 1/SB 24.)

**42-8-154. Preliminary hearing for alleged violation of probation; exceptions to hearing requirement.**

(a) Whenever an options system probationer is arrested on a warrant for an alleged violation of probation, an informal preliminary hearing shall be held within a reasonable time not to exceed 15 days.

(b) A preliminary hearing shall not be required when:

(1) The probationer is not under arrest on a warrant;

(2) The probationer signed a waiver of a preliminary hearing; or

(3) The administrative hearing referred to in Code Section 42-8-155 will be held within 15 days of arrest. (Code 1981, § 42-8-154, enacted by Ga. L. 2009, p. 32, § 1/SB 24.)

**42-8-155. Penalty for probation violation; hearing; waiver of hearing.**

(a) If an options system probationer violates the conditions of probation, the department may impose administrative sanctions as an alternative to judicial modification or revocation of probation.

(b) Upon issuance of a petition outlining the alleged probation violations, the chief probation officer, or his or her designee, may conduct a hearing to determine whether an options system probationer has violated a condition of probation. If the chief probation officer determines that the probationer has violated a condition of probation, the chief probation officer is authorized to impose sanctions consistent with paragraphs (4) through (7) of subsection (c) of Code Section 42-8-153. The failure of an options system probationer to comply with a sanction imposed by the chief probation officer shall constitute a violation of probation.

(c)(1) Upon issuance of a petition outlining the alleged probation violations, the hearing officer may initiate an administrative proceeding to determine whether an options system probationer has violated a condition of probation. If the hearing officer determines by a preponderance of the evidence that the probationer has violated a

condition of probation, the hearing officer may impose sanctions consistent with Code Section 42-8-153.

(2) The administrative proceeding provided for under this subsection shall be commenced within 15 days, but not less than 48 hours after notice of the administrative proceeding has been served on the probationer. The administrative proceeding may be conducted electronically.

(d) The failure of a probationer to comply with the sanction or sanctions imposed by the chief probation officer or hearing officer shall constitute a violation of probation.

(e) An options system probationer may at any time waive a hearing and voluntarily accept the sanctions proposed by the department. (Code 1981, § 42-8-155, enacted by Ga. L. 2009, p. 32, § 1/SB 24.)

#### **42-8-156. Finality of hearing officer's decision; review.**

(a) The hearing officer's decision shall be final unless the options system probationer files a request for review with the senior hearing officer. A request for review must be filed within 15 days of the issuance of the department's decision. Such request shall not stay the department's decision. The senior hearing officer shall issue a response within seven days of receipt of the review request.

(b) The senior hearing officer's decision shall be final unless the options system probationer files an appeal in the sentencing court. Such appeal shall name the commissioner as defendant and shall be filed within 30 days of the issuance of the decision by the senior hearing officer.

(c) This appeal shall first be reviewed by the judge upon the record. At the judge's discretion, a de novo hearing may be held on the decision. The filing of the appeal shall not stay the department's decision.

(d) Where the sentencing judge does not act on the appeal within 30 days of the date of the filing of the appeal, the department's decision shall be affirmed by operation of law. (Code 1981, § 42-8-156, enacted by Ga. L. 2009, p. 32, § 1/SB 24.)

#### **42-8-157. Article not construed as repealing any court's probationary or supervisory power.**

Nothing contained in this article shall be construed as repealing any power given to any court of this state to place offenders on probation or to supervise offenders. (Code 1981, § 42-8-157, enacted by Ga. L. 2009, p. 32, § 1/SB 24.)



42-8-158. Applicability of article.

This article shall only apply in judicial circuits where the department has allocated certified hearing officers. (Code 1981, § 42-8-158, enacted by Ga. L. 2009, p. 32, § 1/SB 24.)

42-8-159. Construction of article.

This article shall be liberally construed so that its purposes may be achieved. (Code 1981, § 42-8-159, enacted by Ga. L. 2009, p. 32, § 1/SB 24.)

CHAPTER 9

PARDONS AND PAROLES

Article 1		Sec.	
General Provisions			
Sec.			
42-9-2.	Creation of board.		
42-9-5.	Compensation of board members.	42-9-43.	Information to be considered by board generally; conduct of investigation and examination; determination as to grant of relief; notice to victim.
42-9-9.	Board employees; retention of badges and weapons.	42-9-43.1.	Citizenship status of prisoner; deportation.
42-9-9.1.	Assistance to law enforcement, correctional, or homeland security agencies; conferring powers of law enforcement officers by the board.	42-9-44.1 and 42-9-44.2.	[Repealed].
42-9-12.	Appointment of replacement for incapacitated member; calling of appointing council by Governor; immunity of council from civil or criminal liability.	42-9-44.3.	Definitions; required community service; liability; work during periods of natural disaster.
42-9-21.	Supervision of persons placed on parole or other conditional release; contracts for services and programs; collection of sums for restitution.	42-9-53.	Preservation of documents; classification of information and documents; divulgence of confidential state secrets; conduct of hearings.
		42-9-58.	Effect of chapter on other laws respecting parole and probation.
Article 2		Article 3	
Grants of Pardons, Paroles, and Other Relief		Uniform Act for Out-of-State Parolee Supervision	
42-9-39.	Restrictions on relief for person serving a second life sentence.	42-9-70, 42-9-71. [Repealed].	
42-9-41.	Duty of board to obtain and place in records information respecting persons subject to re-	Article 4	
		Interstate Compact for Adult Offender Supervision	
		42-9-80. Short title.	

Sec.

- 42-9-81. Execution of compact.  
42-9-82. Powers of Governor with respect to compact.

### Article 5

#### Fees

- 42-9-90. Application fee required for transfer consideration.

## ARTICLE 1

### GENERAL PROVISIONS

#### 42-9-1. Declaration of legislative policy.

#### JUDICIAL DECISIONS

**Jurisdiction.** — Where no grounds existed which required the correction of an inmate's sentence, neither the trial court nor the appellate court had jurisdiction to grant the request under O.C.G.A. § 42-9-1. *Harper v. State*, 262 Ga. App. 136, 586 S.E.2d 336 (2003).

#### 42-9-2. Creation of board.

Pursuant to Article IV, Section II, Paragraph I of the Georgia Constitution, there shall be a State Board of Pardons and Paroles, which shall consist of five members appointed by the Governor, subject to confirmation of the Senate. (Ga. L. 1943, p. 185, § 1; Ga. L. 1972, p. 1069, § 12; Ga. L. 1973, p. 157, § 1; Ga. L. 1983, p. 500, § 2; Ga. L. 1985, p. 283, § 1; Ga. L. 1999, p. 867, § 1.)

**The 1999 amendment**, effective July 1, 1999, deleted the subsection (a) designation and deleted former subsections (b) and (c), which read: "(b) The board is assigned to the Department of Corrections

for administrative purposes only, as prescribed in Code Section 50-4-3.

"(c) The members of the board shall serve ex officio in an advisory capacity to the Board of Corrections."

#### 42-9-3. "Board" defined.

#### JUDICIAL DECISIONS

**Cited** in *Allen v. State*, 286 Ga. 392, 687 S.E.2d 799 (2010).

#### 42-9-5. Compensation of board members.

The members of the board shall devote their full time to the duties of their office. Beginning July 1, 1999, the salaries of the members of the board shall be set by the Governor and their travel expenses and costs

of lodging and meals shall be paid as provided in Code Section 45-7-20. (Ga. L. 1943, p. 185, § 3; Ga. L. 1947, p. 673, § 2; Ga. L. 1952, p. 6, § 1; Ga. L. 1989, p. 14, § 42; Ga. L. 1999, p. 910, § 3; Ga. L. 1999, p. 1213, § 4.)

**The 1999 amendments.** — The first 1999 amendment, effective July 1, 1999, in the second sentence, substituted “The salaries of the members of the board shall be set by the Governor and their” for “The salaries,” deleted a comma following “expenses”, deleted “of the members of the board” following “meals”, inserted “in the same manner and amount”, substituted “Code Section 45-7-20 for those state officials covered by such Code section” for

“Code Sections 45-7-4 and 45-7-20”. The second 1999 amendment, effective July 1, 1999, in the last sentence, substituted “Beginning July 1, 1999, the salaries of the members of the board shall be set by the Governor and their travel expenses” for “The salaries, travel expenses,” deleted “of the members of the board” following “meals” and substituted “Section 45-7-20” for “Sections 47-7-4 and 45-7-20”.

#### **42-9-9. Board employees; retention of badges and weapons.**

(a) The board may appoint such clerical, stenographic, supervisory, and expert assistants and may establish such qualifications for its employees as it deems necessary. In its discretion, the board may discharge such employees.

(b) A certified parole officer leaving the service of the board under honorable conditions who has accumulated 20 or more years of service with the board as a certified parole officer shall be entitled as part of such employee's compensation to retain his or her board issued badge. A certified parole officer employed with the board who is killed in the line of duty shall be entitled to have his or her board issued badge given to a surviving family member. Where a certified parole officer leaves the service of the board due to a disability that arose in the line of duty and such disability prevents the parole officer from further serving as a peace officer, then such disabled parole officer shall be entitled to retain his or her board issued badge regardless of the officer's number of years of service with the board.

(c) An employee leaving the service of the board under honorable conditions who has accumulated 20 or more years of service with the board as a certified officer shall be entitled as part of such employee's compensation to retain his or her board issued weapon.

(d) The board is authorized to promulgate rules and regulations for the implementation of this Code section. (Ga. L. 1943, p. 185, § 9; Ga. L. 2008, p. 285, § 1/SB 502; Ga. L. 2013, p. 82, § 2/HB 482.)

**The 2008 amendment,** effective July 1, 2008, designated the existing provisions as subsection (a), and added subsection (b).

**The 2013 amendment,** effective July 1, 2013, deleted the former last sentence of subsection (b), which read; “The board is authorized to promulgate rules and



regulations for the implementation of this subsection.”, and added subsections (c) and (d).

**42-9-9.1. Assistance to law enforcement, correctional, or homeland security agencies; conferring powers of law enforcement officers by the board.**

(a) In order to assist in the preservation of peace, order, and security, governmental officials from law enforcement, correctional, or homeland security agencies of federal, state, or local governments may request assistance from the board. For the purpose of providing the requested assistance, a majority of the members of the board may confer all powers of a law enforcement officer of this state, including, but not limited to, the power to make arrests for violations of any of the criminal laws of this state, upon any person who is employed by the board and who is otherwise certified as a peace officer under the provisions of Chapter 8 of Title 35.

(b) Before the board grants the powers of a law enforcement officer authorized in subsection (a) of this Code section, the board must find that extraordinary circumstances exist that necessitate additional law enforcement officers.

(c) The time period for the law enforcement officer powers authorized in subsection (a) of this Code section shall be specified when the powers are bestowed, not to exceed 30 days.

(d) While possessing the powers of a law enforcement officer authorized in subsection (a) of this Code section, the board employee shall be under the direction of the federal, state, or local government entity requesting assistance from the board. (Code 1981, § 42-9-9.1, enacted by Ga. L. 2005, p. 1219, § 1/HB 289.)

**Effective date.** — This Code section became effective May 10, 2005.

**42-9-12. Appointment of replacement for incapacitated member; calling of appointing council by Governor; immunity of council from civil or criminal liability.**

(a) Whenever the Governor has personal knowledge or receives information deemed by him to be reliable that any member of the board, by reason of illness or other providential cause, is unable to perform the duties of his office, he shall call a council to be composed of the president of the Medical Association of Georgia, the president of the State Bar of Georgia, and the commissioner of public health for the purpose of ascertaining whether or not any member of the board is in fact unable to perform the duties of his office. In the event the president of the

Medical Association of Georgia is disqualified or unable for any cause to serve on the council, he shall appoint some other member of the Medical Association of Georgia, preferably an elected officer therein, to serve in his place and stead; and he shall notify the Governor of his appointee. In the event the president of the State Bar of Georgia is disqualified or unable for any cause to serve on the council, he shall appoint some other member of the State Bar of Georgia, preferably an elected officer therein, to serve in his place and stead; and he shall notify the Governor of his appointee. In the event the commissioner of public health is disqualified or unable for any cause to serve on the council, the chairman of the Board of Public Health, if he is a physician licensed to practice under Chapter 34 of Title 43, shall serve in place of the commissioner. If both the commissioner and the chairman are disqualified or unable for any cause to serve on the council, the chairman shall designate a member of the Board of Public Health who is a physician licensed to practice under Chapter 34 of Title 43 to serve on the council. The chairman shall notify the Governor of his appointee.

(b) The Governor shall inform the council, appointed pursuant to subsection (a) of this Code section, of the information which has caused him to believe that a member of the board is unable to perform the duties of his office. If the council or a majority thereof, after a full investigation and examination into the truth of such information, shall, in writing duly signed, find that a member is incapacitated to perform the duties of his office, the Governor shall execute an executive order relating such facts. The member shall thereupon be suspended from performing the duties of his office and the Governor shall appoint a person to perform the duties of such member of the board during his incapacity.

(c) The person appointed to perform the duties of a member of the board shall give bond with good security as required of other members of the board, shall be given the same oath of office as other members of the board, and shall be issued a commission as a member of the board, which shall be effective so long as the person performs the duties of a member of the board. Upon giving the bond and taking the oath as required by this Code section, and upon being issued his commission as authorized in this Code section, the person shall be authorized to do everything, perform every act, and exercise every prerogative and discretion that any other member of the board might do, perform, or exercise under existing law.

(d) The person appointed to serve as a member of the board in the place and stead of an incapacitated member shall be subject to the confirmation of the Senate, if the Senate is in session at the time of his appointment or convenes in session prior to the expiration of his appointment. Any such appointment made at times when the Senate is not in session shall be effective ad interim.

(e) During the period of incapacity of a member of the board, the member shall be entitled to receive the compensation and such other benefits as may be provided by law or otherwise for members of the board.

(f) Notwithstanding any other law to the contrary, the appointee may be an elected official, appointed official, or employee of this state. The order appointing the person to serve in the place and stead of any incapacitated member shall include his compensation. The compensation to be received by such person shall not exceed the compensation received by other members of the board.

(g) No member of the council designated pursuant to this Code section shall be civilly or criminally liable for his actions and doings as a member of the council. This provision may be pleaded as an absolute defense in any civil or criminal proceedings relative thereto. (Code 1933, § 77-502.1, enacted by Ga. L. 1970, p. 729, § 1; Ga. L. 1985, p. 149, § 42; Ga. L. 1989, p. 14, § 42; Ga. L. 2009, p. 453, §§ 1-5, 1-6/HB 228; Ga. L. 2011, p. 705, §§ 6-4, 6-5/HB 214.)

**The 2009 amendment**, effective July 1, 2009, in subsection (a), substituted “commissioner of community health” for “commissioner of human resources” in the first and fourth sentences, and substituted “Board of Community Health” for “Board of Human Resources” in the next-to-last two sentences.

**The 2011 amendment**, effective July 1, 2011, in subsection (a), substituted

“Board of Public Health” for “Board of Community Health” in the fourth and fifth sentences and substituted “commissioner of public health” for “commissioner of community health” in the first and fourth sentences.

**Law reviews.** — For article on the 2011 amendment of this Code section, see 28 Ga. St. U.L. Rev. 147 (2011).

## 42-9-20. General duties of board.

### JUDICIAL DECISIONS

**State supreme court vacated the trial court’s judgment denying an inmate’s petition for a writ of habeas corpus** challenging procedures used by the Georgia State Board of Pardons and Paroles when it revoked the inmate’s parole because the recommendation submitted by the Board member who heard the allegations was not a part of the record and there was no evidence in the record which allowed the court to determine the basis of absent Board members’ decisions to accept that recommendation and what procedures were followed in revoking the inmate’s parole. *Roberts v. Scroggy*, 278 Ga. 25, 597 S.E.2d 385 (2004).

#### Parole conditions.

Trial court did not err in denying parolee’s petition for writ of mandamus to lift parole conditions requiring electronic monitoring and that the parolee get sex offender counseling as the electronic monitoring condition had been lifted by the time the trial court held a hearing on that condition and the parole board did not act in an arbitrary, capricious, and unreasonable manner in imposing the counseling condition as the parolee’s offenses, while they were not sexually violent offenses, had sexual overtones; thus, the parole board acted consistent with its primary goal of protecting society. *Massey v. Ga.*



Bd. of Pardons & Paroles, 275 Ga. 127, 562 S.E.2d 172 (2002).

**Cited** in *Garner v. Jones*, 529 U.S. 244, 120 S. Ct. 1362, 146 L. Ed. 2d 236 (2000).

**42-9-21. Supervision of persons placed on parole or other conditional release; contracts for services and programs; collection of sums for restitution.**

(a) The board shall have the function and responsibility of supervising all persons placed on parole or other conditional release by the board.

(b) The board is authorized to maintain and operate or to enter into memoranda of agreement or other written documents evidencing contracts with other state agencies, persons, or any other entities for transitional or intermediate or other services or for programs deemed by the board to be necessary for parolees or others conditionally released from imprisonment by order of the board and to require as a condition of relief that the offender pay directly to the provider a reasonable fee for said services or programs.

(c) In all cases where restitution is applicable, the board shall collect during the parole period those sums determined to be owed to the victim. (Ga. L. 1977, p. 1209, § 1; Ga. L. 1992, p. 3221, § 9; Ga. L. 1996, p. 1097, § 1; Ga. L. 1998, p. 1376, § 1.)

**The 1998 amendment**, effective April 20, 1998, in subsection (b), substituted “any other” for “nonsectarian”, and added “and to require as a condition of relief that

the offender pay directly to the provider a reasonable fee for said services or programs” at the end.

## ARTICLE 2

### GRANTS OF PARDONS, PAROLES, AND OTHER RELIEF

**42-9-39. Restrictions on relief for person serving a second life sentence.**

(a) The provisions of this Code section shall be binding upon the board in granting pardons and paroles, notwithstanding any other provisions of this article or any other law relating to the powers of the board.

(b) Except as otherwise provided in subsection (b) of Code Section 17-10-7, when a person is convicted of murder and sentenced to life imprisonment and such person has previously been incarcerated under a life sentence, such person shall serve at least 30 years in the penitentiary before being granted a pardon and before becoming eligible for parole.

(c) When a person receives consecutive life sentences as the result of offenses occurring in the same series of acts and any one of the life sentences is imposed for the crime of murder, such person shall serve consecutive 30 year periods for each such sentence, up to a maximum of 60 years, before being eligible for parole consideration.

(d) Any other provisions of this Code section to the contrary notwithstanding, the board shall have the authority to pardon any person convicted of a crime who is subsequently determined to be innocent of said crime. (Code 1981, § 42-9-39, enacted by Ga. L. 1983, p. 523, § 1; Ga. L. 1994, p. 1959, § 14; Ga. L. 2006, p. 379, § 27/HB 1059.)

**The 2006 amendment**, effective July 1, 2006, in subsection (b), substituted “30 years” for “25 years”; and in subsection (c), substituted “30 year periods” for “ten year periods” and substituted “60 years” for “30 years”.

**Editor’s notes.** — Ga. L. 1998, p. 180, § 1, not codified by the General Assembly, provides: “The General Assembly declares and finds: (1) That the ‘Sentence Reform Act of 1994,’ approved April 20, 1994 (Ga. L. 1994, p. 1959), provided that persons convicted of one of seven serious violent felonies shall serve minimum mandatory terms of imprisonment which shall not otherwise be suspended, stayed, probated, deferred, or withheld by the sentencing court; (2) That in *State v. Allmond*, 225 Ga. App. 509 (1997), the Georgia Court of Appeals held, notwithstanding the ‘Sentence Reform Act of 1994,’ that the provisions of the First Offender Act would still be available to the sentencing court, which would mean that a person who

committed a serious violent felony could be sentenced to less than the minimum mandatory ten-year sentence; and (3) That, contrary to the decision in *State v. Allmond*, it is the expressed intent of the General Assembly that persons who commit a serious violent felony specified in the ‘Sentence Reform Act of 1994’ shall be sentenced to a mandatory term of imprisonment of not less than ten years and shall not be eligible for first offender treatment.”

Ga. L. 2006, p. 379, § 30, not codified by the General Assembly, provides, in part, that: “The provisions of this Act shall not affect or abate the status as a crime of any such act or omission which occurred prior to the effective date of the Act repealing, repealing and reenacting, or amending such law, nor shall the prosecution of such crime be abated as a result of such repeal, repeal and reenactment, or amendment.”

**Law reviews.** — For article on 2006 amendment of this Code section, see 23 Ga. St. U.L. Rev. 11 (2006).

## JUDICIAL DECISIONS

### Construction with Georgia Street Gang and Terrorism Prevention Act.

— There is no legal authority to support the proposition that the Georgia Street Gang and Terrorism Prevention Act, O.C.G.A. § 16-15-1 et seq., and O.C.G.A. § 42-9-39, two very differently worded statutory provisions, are equivalent; thus, defendant’s argument that, as a matter of law, if the armed robbery of September 17,

1999, and the murder of December 28, 1999, are considered as part of the “pattern of criminal street gang activity” for purposes of violating the Street Gang Act, they must necessarily also be considered “offenses occurring in the same series of acts” within the meaning of O.C.G.A. § 42-9-39(c) failed. *Seabolt v. State*, 279 Ga. 518, 616 S.E.2d 448 (2005).

**42-9-40. Parole guidelines system.****JUDICIAL DECISIONS**

**Role of board in denying parole.** — Plaintiff's contention that the Georgia Parole Board was not vested with the discretion to deny parole was specious in light of O.C.G.A. § 42-9-40. *Toenniges v. Ga. Dep't of Corr.*, No. 1:09-CV-165 (WLS), 2010 U.S. Dist. LEXIS 52907 (M.D. Ga. May 26, 2010).

**Mandamus not available to compel change in parole date.**

Even though the State Pardons and Paroles Board was required to adopt a parole guideline system on all inmates who would become eligible for parole, ex-

cept for inmates serving life sentences, the board was not obligated to grant parole to a prisoner at the earliest date parole had to be considered as the issue of whether to grant parole was a discretionary matter entrusted to the board; thus, the prisoner's petition for a writ of mandamus to compel parole at an earlier time should have been denied. *Ray v. Carthen*, 275 Ga. 459, 569 S.E.2d 542 (2002).

**Cited in** *Terry v. Hamrick*, 284 Ga. 24, 663 S.E.2d 256 (2008); *Bradshaw v. State*, 284 Ga. 675, 671 S.E.2d 485 (2008).

**42-9-41. Duty of board to obtain and place in records information respecting persons subject to relief or placed on probation; investigations; rules.**

(a) It shall be the duty of the board to obtain and place in its permanent records information as complete as may be practicable on every person who may become subject to any relief which may be within the power of the board to grant. The information shall be obtained as soon as possible after imposition of the sentence and shall include:

(1) A complete statement of the crime for which the person is sentenced, the circumstances of the crime, and the nature of the person's sentence;

(2) The court in which the person was sentenced;

(3) The term of his sentence;

(4) The name of the presiding judge, the prosecuting officers, the investigating officers, and the attorney for the person convicted;

(5) A copy of presentence investigation and any previous court record;

(6) A fingerprint record;

(7) A copy of all probation reports which may have been made; and

(8) Any social, physical, mental, or criminal record of the person.

(b) The board in its discretion may also obtain and place in its permanent records similar information on each person who may be placed on probation. The board shall immediately examine such records and any other records obtained and make such other investigation as it



may deem necessary. It shall be the duty of the court and of all probation officers and other appropriate officers to furnish to the board, upon its request, such information as may be in their possession or under their control. The Department of Behavioral Health and Developmental Disabilities and all other state, county, and city agencies, all sheriffs and their deputies, and all peace officers shall cooperate with the board and shall aid and assist it in the performance of its duties. The board may make such rules as to the privacy or privilege of such information and as to its use by persons other than the board and its staff as may be deemed expedient in the performance of its duties. (Ga. L. 1943, p. 185, § 12; Ga. L. 2009, p. 453, § 3-2/HB 228.)

**The 2009 amendment**, effective July 1, 2009, substituted “Department of Behavioral Health and Developmental Dis-

abilities” for “Department of Human Resources” in the fourth sentence of subsection (b).

JUDICIAL DECISIONS

**Impact of parole officers and board’s actions.** — Parole board was responsible for maintaining a complete record on any person who came under the power of the board and that record included the nature and term of the individual’s sentence; furthermore, it was the parole board that has the power to set the terms and conditions of parole. Thus, the acts of the parole officer, or those within the parole board who make such determi-

nations, in setting the expiration dates of plaintiff’s parole, served to break the chain of causation with respect to any error that might have flowed from the misstatement in the parole officer’s motion; the parole officer had no power to increase plaintiff’s sentence and no power to set the terms of plaintiff’s parole. *Morgan v. Yarbrough*, No. 7:07-cv-45 (HL), 2008 U.S. Dist. LEXIS 35269 (M.D. Ga. Apr. 30, 2008).

42-9-42. Procedure for granting relief from sentence; conditions and prerequisites; violation of parole.

JUDICIAL DECISIONS

**Cited in** *Green v. State*, 283 Ga. App. 541, 642 S.E.2d 167 (2007); *Terry v. Hamrick*, 284 Ga. 24, 663 S.E.2d 256

(2008); *Allen v. State*, 286 Ga. 392, 687 S.E.2d 799 (2010).

42-9-42.1. Use of HIV test results in granting relief from sentence; conditions.

**Cross references.** — Child committing delinquent act constituting AIDS transmission crime including testing and reporting, § 15-11-603.

**42-9-43. Information to be considered by board generally; conduct of investigation and examination; determination as to grant of relief; notice to victim.**

(a) The board, in considering any case within its power, shall cause to be brought before it all pertinent information on the person in question. Included therein shall be:

(1) A report by the superintendent, warden, or jailer of the jail or state or county correctional institution in which the person has been confined upon the conduct of record of the person while in such jail or state or county correctional institution;

(2) The results of such physical and mental examinations as may have been made of the person;

(3) The extent to which the person appears to have responded to the efforts made to improve his or her social attitude;

(4) The industrial record of the person while confined, the nature of his or her occupations while so confined, and a recommendation as to the kind of work he or she is best fitted to perform and at which he or she is most likely to succeed when and if he or she is released;

(5) The educational programs in which the person has participated and the level of education which the person has attained based on standardized reading tests; and

(6) The written, oral, audiotaped, or videotaped testimony of the victim, the victim's family, or a witness having personal knowledge of the victim's personal characteristics.

(b)(1) As used in this subsection, the term:

(A) "Debilitating terminal illness" means a disease that cannot be cured or adequately treated and that is reasonably expected to result in death within 12 months.

(B) "Entirely incapacitated" means an offender who:

(i) Requires assistance in order to perform two or more necessary daily life functions or who is completely immobile; and

(ii) Has such limited physical or mental ability, strength, or capacity that he or she poses an extremely low risk of physical threat to others or to the community.

(C) "Necessary daily life function" means eating, breathing, dressing, grooming, toileting, walking, or bathing.

(2) The board may issue a medical reprieve to an entirely incapacitated person suffering a progressively debilitating terminal illness in

accordance with Article IV, Section II, Paragraph II of the Constitution.

(c) The board may also make such other investigation as it may deem necessary in order to be fully informed about the person.

(d) Before releasing any person on parole, the board may have the person appear before it and may personally examine him or her. Thereafter, upon consideration, the board shall make its findings and determine whether or not such person shall be granted a pardon, parole, or other relief within the power of the board; and the board shall determine the terms and conditions thereof. Notice of the determination shall be given to such person and to the correctional official having him or her in custody.

(e) If a person is granted a pardon or a parole, the correctional officials having the person in custody, upon notification thereof, shall inform him or her of the terms and conditions thereof and shall, in strict accordance therewith, release the person.

(f) The board shall send written notification of the parole decision to the victim or, if the victim is no longer living, to the family of the victim. (Ga. L. 1943, p. 185, § 14; Ga. L. 1986, p. 1596, § 4; Ga. L. 2009, p. 192, § 2/SB 151; Ga. L. 2013, p. 222, § 19/HB 349.)

**The 2009 amendment**, effective July 1, 2009, inserted “or her” and “or she” throughout this Code section; in subsection (a), deleted “and” at the end of paragraph (a)(4), substituted “; and” for a period at the end of paragraph (a)(5), and added paragraph (a)(6); added the subsection (b) designation to the formerly undesignated language at the end of subsection (a); redesignated former subsections (b) and (c) as present subsections (c) and (d), respectively; in subsection (c), substituted “such person” for “the person” twice; and added subsection (e).

**The 2013 amendment**, effective July 1, 2013, added subsection (b); and redesignated former subsections (b) through (e) as present subsections (c) through (f), respectively. See editor’s note for applicability.

**Cross references.** — Crime Victims’ Bill of Rights, T. 17, C. 17.

**Editor’s notes.** — Ga. L. 2013, p. 222, § 21/HB 349, not codified by the General Assembly, provides: “This Act shall become effective on July 1, 2013, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2013, shall be governed by the statute in effect at the time of such offense.”

**Editor’s notes.** — Ga. L. 2013, p. 222, § 21/HB 349, not codified by the General Assembly, provides: “This Act shall become effective on July 1, 2013, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2013, shall be governed by the statute in effect at the time of such offense.”

## JUDICIAL DECISIONS

**No interview required.** — Because a prior district court order only required that the inmate be considered for parole annually under the rules in effect at the time of the inmate’s offense, and neither the order nor the rule in effect at the time of the inmate’s offense required interviews, the members of Georgia’s Board of Pardons and Paroles complied with the

order; and, while the United States Court of Appeals for the Eleventh Circuit included interviews in the list of actions encompassed by “parole reconsideration hearing,” the Eleventh Circuit did not hold that an in-person interview was mandated, and O.C.G.A. § 42-9-43(b), the statute cited by the Eleventh Circuit, did not require such an interview. *Akins v.*



Perdue, No. 1:05-CV-336-TWT, 2006 U.S. Dist. LEXIS 25942 (N.D. Ga. Apr. 18, 2006).

**No power to increase sentence.** — Parole board was responsible for maintaining a complete record on any person who came under the power of the board and that record included the nature and term of the individual's sentence; furthermore, it was the parole board that has the power to set the terms and conditions of parole. Thus, the acts of the parole officer,

or those within the parole board who make such determinations, in setting the expiration dates of plaintiff's parole, served to break the chain of causation with respect to any error that might have flowed from the misstatement in the parole officer's motion; the parole officer had no power to increase plaintiff's sentence and no power to set the terms of plaintiff's parole. *Morgan v. Yarbrough*, No. 7:07-cv-45 (HL), 2008 U.S. Dist. LEXIS 35269 (M.D. Ga. Apr. 30, 2008).

#### 42-9-43.1. Citizenship status of prisoner; deportation.

(a) In determining whether to grant parole the board shall be authorized to make inquiry into whether the prisoner is lawfully present in the United States under federal law.

(b) If the board determines that the prisoner is not lawfully present in the United States, the board shall be authorized to make inquiry into whether the prisoner would be legally subject to deportation from the United States while on parole.

(c) If the board determines that the prisoner would be legally subject to deportation from the United States while on parole, the board may:

(1) Consider the interest of the state in securing certain and complete execution of its judicial sentences in criminal cases;

(2) Consider the likelihood that deportation may intervene to frustrate that state interest if parole is granted; and

(3) Where appropriate, decline to grant parole in furtherance of the state interest in certain and complete execution of sentences.

(d) Any grant of parole to an alien prisoner, as such term is defined in Code Section 42-1-11.1, who is subject to deportation shall be conditioned upon the deportation of such prisoner pursuant to a final removal order and a further condition that such prisoner abide by the deportation order and all immigration laws of the United States. (Code 1981, § 42-9-43.1, enacted by Ga. L. 2007, p. 34, § 2/SB 23; Ga. L. 2010, p. 263, § 3/SB 136.)

**Effective date.** — This Code section became effective May 11, 2007.

**The 2010 amendment**, effective July 1, 2010, in subsection (c), substituted "Consider" for "Be authorized to consider" at the beginning of paragraph (c)(2) and deleted "be authorized to" preceding "decline" in paragraph (c)(3); and added subsection (d).

**Cross references.** — Factoring into sentencing determinations citizenship status of convict, § 17-10-1.3.

**Editor's notes.** — Ga. L. 2007, p. 34, § 3, not codified by the General Assembly, provides that: "The General Assembly finds that this Act states factors for consideration in discretionary decision-making processes within the criminal justice system. The

General Assembly finds that such factors could have been considered prior to or without the enactment of this Act. Accordingly, it is the intention of the General Assembly that this Act may be applied with respect to offenses committed prior to its effective date as well as offenses committed on or after its effective date. However, if there should be a judicial determination that retrospective application is prohibited, it is the intention of the General Assembly that retrospective application should be severable.”

Ga. L. 2010, p. 263, § 1, not codified by the General Assembly, provides: “It is the intent of the General Assembly to ensure that alien prisoners subject to deportation are not released from prison into the Georgia community. It is further the intent of this legislative body to reduce the costs and expenses of operating state prisons by

reducing the number of alien prisoners incarcerated in the Georgia penal system and to expedite the deportation process of such prisoners. Moreover, Georgia should support the rearrest and revocation of parole of any alien prisoner who reenters the United States in violation of a release on a reprieve with a detainer to United States Immigration and Customs Enforcement. The General Assembly intends to require state agencies to take part in the Immigration and Customs Enforcement Rapid Removal of Eligible Parolees Accepted for Transfer (REPAT) Program funded and operated by the United States government and take all measures to fully cooperate and communicate with state, local, and federal agencies for the implementation of such program.”

#### **42-9-44. Specification of terms and conditions of parole; adoption of general and special rules; violation of parole; certain parolees to obtain high school diploma or general educational development (GED) diploma.**

### **JUDICIAL DECISIONS**

#### **Board control over prisoner.**

Habeas court erroneously addressed a defendant’s challenge to a parole condition that banned the defendant from all counties in the State of Georgia but one as the habeas court’s attempt to control the parole condition was a violation of the

constitutional provision regarding the separation of powers since the Board of Pardons and Paroles had executive power regarding the terms and conditions of paroles. *Terry v. Hamrick*, 284 Ga. 24, 663 S.E.2d 256 (2008), cert. denied, 129 S. Ct. 510, 172 L.Ed.2d 375 (2008).

#### **42-9-44.1 and 42-9-44.2.**

Reserved. Repealed by Ga. L. 2006, p. 379, § 28/HB 1059, effective July 1, 2006.

**Editor’s notes.** — These Code sections were based on Code 1981, §§ 42-9-44.1 and 42-9-44.2 enacted by Ga. L. 1994, p.

791, § 1; Ga. L. 1997, p. 1578, § 2; Ga. L. 2005, p. 60, § 42/HB 95.

#### **42-9-44.3. Definitions; required community service; liability; work during periods of natural disaster.**

(a) As used in this Code section, the term:

(1) "Agency employee" means an employee or agent of a community service agency, whether the individual is a paid or unpaid employee or agent.

(2) "Community service" means uncompensated work by an offender with a community service agency for the benefit of the community pursuant to a directive of the State Board of Pardons and Paroles or its designee as a condition of parole or as an alternative to the revocation of parole.

(3) "Community service agency" means any private or public agency or organization approved by the State Board of Pardons and Paroles to participate in a community service program.

(4) "Community service supervisor" means an individual who places or supervises offenders directed to perform community service, whether the individual is a paid or unpaid supervisor.

(5) "Offender" means a person who has been convicted of a crime, who is under the jurisdiction of the State Board of Pardons and Paroles, and who has been granted conditional executive clemency.

(b) The State Board of Pardons and Paroles or its designee may direct an offender to perform community service as a condition of parole or as an alternative to the revocation of parole.

(c) Neither the community service agency nor the community service supervisor or agency employees shall be liable to any offender performing community service for any acts or omissions related to participation in a community service program. This limitation of liability does not apply to any act or omission by any community service agency, community service supervisor, or agency employee that constitutes gross negligence or willful misconduct.

(d) It shall be unlawful to use or to allow an offender to be used for any purpose resulting in private gain to an individual, but this subsection shall not apply to work on private property made necessary due to a natural disaster if the work is approved by the State Board of Pardons and Paroles. (Code 1981, § 42-9-44.3, enacted by Ga. L. 2000, p. 1554, § 1.)

**Effective date.** — This Code section became effective May 1, 2000.

#### 42-9-45. General rule-making power.

**Editor's notes.** — Ga. L. 1998, p. 180, § 1, not codified by the General Assembly, provides: "The General Assembly declares and finds: (1) That the 'Sentence Reform Act of 1994,' approved April 20, 1994 (Ga.

L. 1994, p. 1959), provided that persons convicted of one of seven serious violent felonies shall serve minimum mandatory terms of imprisonment which shall not otherwise be suspended, stayed, probated,



deferred, or withheld by the sentencing court; (2) That in *State v. Allmond*, 225 Ga. App. 509 (1997), the Georgia Court of Appeals held, notwithstanding the 'Sentence Reform Act of 1994,' that the provisions of the First Offender Act would still be available to the sentencing court, which would mean that a person who committed a serious violent felony could be sentenced to less than the minimum mandatory ten-year sentence; and (3) That, contrary to the decision in *State v. Allmond*, it is the expressed intent of the

General Assembly that persons who commit a serious violent felony specified in the 'Sentence Reform Act of 1994' shall be sentenced to a mandatory term of imprisonment of not less than ten years and shall not be eligible for first offender treatment."

**Law reviews.** — For article, "Garner v. Jones: Restricting Prisoners' Ex Post Facto Challenges to Changes in Parole Systems," see 52 Mercer L. Rev. 761 (2001).

## JUDICIAL DECISIONS

### No constitutionally protected interest in parole.

State prisoner's rights under the due process clause were not violated because there was no liberty interest in parole, nothing in 28 U.S.C. § 1915A required an evidentiary hearing prior to a sua sponte dismissal of a 42 U.S.C. § 1983 case for failure to state a claim, and O.C.G.A. § 42-9-45(f) did not create a liberty interest in parole after a residential burglary conviction. *Heard v. Ga. State Bd. of Pardons & Paroles*, 222 Fed. Appx. 838 (11th Cir. 2007) (Unpublished).

### Retroactive change in the method for calculating the tentative parole month, etc.

The retroactive application of amendments to the Georgia regulations changing the frequency of parole reviews, Ga. Comp. R. & Regs. r. 475-3-.05.(2) (1986), does not violate the ex post facto clause of the United States Constitution. *Garner v. Jones*, 529 U.S. 244, 120 S. Ct. 1362, 146 L. Ed. 2d 236 (2000).

Retroactive application of Rule 475-3-.05 (2) of the Board of Pardons and Paroles, allowing the board to extend the interval between parole reconsiderations up to a period of eight years for an inmate serving a life sentence, does not violate the ex post facto clause of the United States Constitution. *Ray v. Jacobs*, 272 Ga. 760, 534 S.E.2d 418 (2000).

**Determining when to parole is discretionary decision.** — State Pardons and Parole Board had the power to promulgate rules and regulations dictating the practices and procedures pertaining to parole, and the requirement that it set forth the time when the automatic initial consideration for parole of a prisoner would take place did not mean that parole had to take place at that time as the decision of when to parole a prisoner was a discretionary decision entrusted to the board. *Ray v. Carthen*, 275 Ga. 459, 569 S.E.2d 542 (2002).

**Cited in** *Bradshaw v. State*, 284 Ga. 675, 671 S.E.2d 485 (2008).

## 42-9-48. Arrest of parolee or conditional release violator.

## JUDICIAL DECISIONS

**Parole officer's duties not subject to liability.** — A parole officer's duties under subsection (d) are discretionary within the meaning of the Georgia Tort Claims Act

and therefore not subject to liability. *Rowe v. State Bd. of Pardons & Parole*, 240 Ga. App. 163, 523 S.E.2d 40 (1999).

**42-9-49. Reimbursement of counties for incarceration of persons arrested in accordance with Code Section 42-9-48.**

**JUDICIAL DECISIONS**

**Standing.** — Because a county could sue the state agencies by challenging the constitutionality of O.C.G.A. §§ 42-9-49 and 42-5-51(c) (regarding reimbursement of the detention costs of certain state inmates), and because the county did not dispute that the agencies complied with the sections, the trial court should have granted the agencies' motion for summary judgment. *Ga. Dep't of Corr. v. Chatham County*, 274 Ga. App. 865, 619 S.E.2d 373 (2005).

**42-9-50. Preliminary hearing for parole or conditional release violator; ratification or overruling of decision of hearing officer by board; disposition of violator.**

**JUDICIAL DECISIONS**

Cited in *Green v. State*, 283 Ga. App. 541, 642 S.E.2d 167 (2007).

**42-9-51. Final hearing for parole or conditional release violator; order and statement as to disposition of violator; revocations without hearing and temporary revocations.**

**JUDICIAL DECISIONS**

**ANALYSIS**

GENERAL CONSIDERATION  
 REQUIREMENT OF DUE PROCESS FOR PAROLE REVOCATION

**General Consideration**

Cited in *Green v. State*, 283 Ga. App. 541, 642 S.E.2d 167 (2007).

**Requirement of Due Process for Parole Revocation**

State supreme court vacated the trial court's judgment denying an inmate's petition for a writ of habeas corpus challenging procedures used by the Georgia State Board of Pardons and

Paroles when it revoked the inmate's parole because the recommendation submitted by the Board member who heard the allegations was not a part of the record and there was no evidence in the record which allowed the court to determine the basis of absent Board members' decisions to accept that recommendation and what procedures were followed in revoking the inmate's parole. *Roberts v. Scroggy*, 278 Ga. 25, 597 S.E.2d 385 (2004).

**42-9-52. Discharge from parole; earned-time allowance; granting of pardons, commutations, and remissions of fines, forfeitures, or penalties.**

**RESEARCH REFERENCES**

**ALR.** — Revocation of order commuting state criminal sentence, 88 ALR5th 463.  
 Defendant's right to credit for time spent in halfway house, rehabilitation center, or similar restrictive environment as condition of pretrial release, 46 ALR6th 63.

**42-9-53. Preservation of documents; classification of information and documents; divulgence of confidential state secrets; conduct of hearings.**

(a) Subject to other laws, the board shall preserve on file all documents on which it has acted in the granting of pardons, paroles, and other relief.

(b) All information, both oral and written, received by the members of the board in the performance of their duties under this chapter and all records, papers, and documents coming into their possession by reason of the performance of their duties under this chapter shall be classified as confidential state secrets until declassified by the board; provided, however, that the board shall be authorized to disclose to an alleged violator of parole or conditional release the evidence introduced against him or her at a final hearing on the matter of revocation of parole or conditional release; provided, further, that the board may make supervision records of the board available to probation officials employed with the Department of Corrections and the Sexual Offender Registration Review Board, provided that the same shall remain confidential and not available to any other person or subject to subpoena unless declassified by the board.

(c) No person shall divulge or cause to be divulged in any manner any confidential state secret. Any person violating this Code section or any person who causes or procures a violation of this Code section or conspires to violate this Code section shall be guilty of a misdemeanor.

(d) All hearings required to be held by this chapter shall be public, and the transcript thereof shall be exempt from subsection (b) of this Code section. All records and documents which were public records at the time they were received by the board are exempt from subsection (b) of this Code section. All information, reports, and documents required by law to be made available to the General Assembly, the Governor, or the state auditor are exempt from subsection (b) of this Code section. (Ga. L. 1943, p. 185, § 20; Ga. L. 1953, Nov.-Dec. Sess., p. 210, § 1; Ga. L. 1975, p. 786, § 4; Ga. L. 1982, p. 3, § 42; Ga. L. 2011, p. 620, § 2/SB 214; Ga. L. 2013, p. 1056, § 2/HB 122.)



**The 2011 amendment**, effective July 1, 2011, in subsection (b), substituted “by the board” for “by a resolution of the board passed at a duly constituted session of the board” near the middle, inserted “or her” near the end, and added the proviso at the end.

**The 2013 amendment**, effective July 1, 2013, inserted “and the Sexual Offender Registration Review Board” near the end of subsection (b).

**Law reviews.** — For annual survey of death penalty law, see 56 Mercer L. Rev. 197 (2004).

### JUDICIAL DECISIONS

#### **Exemption from confidentiality requirement.**

State board of pardons and paroles’ only description of the disputed documents was its characterization of two cover letters as “critical” of the prisoner; because the state had a compelling and justifiable interest in creating and preserving the privilege in O.C.G.A. § 42-9-53(b), the privilege was not waived merely by the board’s reference to, and brief description of, a few privileged documents. *Taylor v. Nix*, 451 F. Supp. 2d 1351 (N.D. Ga. 2006).

#### **Inmate not allowed to examine file.**

State prisoner’s motion to compel was properly denied under Fed. R. Civ. P. 26(b) because the documents requested from a parole board, although they might have been relevant to one or more of the prisoner’s claims under 42 U.S.C. § 1983, were still subject to the confidential state secrets privilege under O.C.G.A. § 42-9-53(b). *Taylor v. Nix*, 240 Fed. Appx. 830 (11th Cir. 2007) (Unpublished).

### RESEARCH REFERENCES

**ALR.** — Invocation and effect of state secrets privilege, 23 ALR6th 521.

#### **42-9-58. Effect of chapter on other laws respecting parole and probation.**

Nothing in this chapter shall be construed to change or modify the laws respecting parole and probation as administered by the juvenile courts of this state or the Department of Human Services or the courts where persons have been placed on probation in cases involving nonsupport or abandonment of minor children. (Ga. L. 1943, p. 185, § 25; Ga. L. 2009, p. 453, § 2-2/HB 228.)

**The 2009 amendment**, effective July 1, 2009, substituted “Department of Human Services” for “Department of Human Resources” in this Code section.

#### **42-9-60. Overcrowding of prison system as creating state of emergency; paroling inmates to reduce prison system population to capacity; annual report of inmates paroled.**

### JUDICIAL DECISIONS

**Cited in** *Jackson v. State*, 299 Ga. App. 356, 683 S.E.2d 60 (2009).

## ARTICLE 3

## UNIFORM ACT FOR OUT-OF-STATE PAROLEE SUPERVISION

## 42-9-70 and 42-9-71.

Reserved. Repealed by Ga. L. 2008, p. 240, § 2, effective July 1, 2008.

**Editor's notes.** — This article consisted of Code Sections 42-9-70 and 42-9-71, and was based on Ga. L. 1950, p. 405, §§ 1, 4; Ga. L. 1996, p. 6, § 42.

## ARTICLE 4

## INTERSTATE COMPACT FOR ADULT OFFENDER SUPERVISION

**Effective date.** — This article became effective July 1, 2002.

**Editor's notes.** — Ga. L. 2002, p. 1297, § 2, not codified by the General Assembly, provides: "This Act shall become effective on July 1, 2002, or upon enactment by no fewer than 35 states of the Interstate Compact for Adult Supervision in substantially the form set out in Section 1 of this Act, whichever last occurs. For purposes of this section, the term 'state' shall have the meaning provided by Section 1 of this Act." The compact provided by this article has been adopted by the number of states required to make the compact effective.

## 42-9-80. Short title.

This article shall be known and may be cited as "The Interstate Compact for Adult Offender Supervision." (Code 1981, § 42-9-80, enacted by Ga. L. 2002, p. 1297, § 1.)

**Law reviews.** — For note on the 2002 enactment of this chapter, see 19 Ga. St. U.L. Rev. 308 (2002).

## 42-9-81. Execution of compact.

The Governor of this state is authorized and directed to execute a compact on behalf of the State of Georgia with any of the United States legally joining therein in the form substantially as follows:

## "ARTICLE I.

## PURPOSE.

The compacting states to this Interstate Compact recognize that each state is responsible for the supervision of adult offenders in the community who are authorized pursuant to the By-laws and Rules of this compact to travel across state lines both to and from each compacting state in such a manner as to track the location of offenders, transfer supervision authority in an orderly and efficient manner, and when necessary return offenders to the originating jurisdictions. The compacting states also recognize that Congress, by enacting the Crime

Control Act, 4 U.S.C. Section 112(1965), has authorized and encouraged compacts for cooperative efforts and mutual assistance in the prevention of crime. It is the purpose of this compact and the Interstate Commission created hereunder, through means of joint and cooperative action among the compacting states: to provide the framework for the promotion of public safety and protect the rights of victims through the control and regulation of the interstate movement of offenders in the community; to provide for the effective tracking, supervision, and rehabilitation of these offenders by the sending and receiving states; and to equitably distribute the costs, benefits and obligations of the compact among the compacting states. In addition, this compact will: create an Interstate Commission which will establish uniform procedures to manage the movement between states of adults placed under community supervision and released to the community under the jurisdiction of courts, paroling authorities, corrections or other criminal justice agencies which will promulgate rules to achieve the purpose of this compact; ensure an opportunity for input and timely notice to victims and to jurisdictions where defined offenders are authorized to travel or to relocate across state lines; establish a system of uniform data collection, access to information on active cases by authorized criminal justice officials, and regular reporting of Compact activities to heads of state councils, state executive, judicial, and legislative branches and criminal justice administrators; monitor compliance with rules governing interstate movement of offenders and initiate interventions to address and correct non-compliance; and coordinate training and education regarding regulations of interstate movement of offenders for officials involved in such activity. The compacting states recognize that there is no 'right' of any offender to live in another state and that duly accredited officers of a sending state may at all times enter a receiving state and there apprehend and retake any offender under supervision subject to the provisions of this compact and By-laws and Rules promulgated hereunder. It is the policy of the compacting states that the activities conducted by the Interstate Commission created herein are the formation of public policies and are therefore public business.

## ARTICLE II.

### DEFINITIONS.

As used in this compact, unless the context clearly requires a different construction:

(1) 'Adult' means both individuals legally classified as adults and juveniles treated as adults by court order, statute, or operation of law.

(2) 'By-laws' mean those by-laws established by the Interstate Commission for its governance, or for directing or controlling the Interstate Commission's actions or conduct.



(3) 'Compact Administrator' means the individual in each compacting state appointed pursuant to the terms of this compact responsible for the administration and management of the state's supervision and transfer of offenders subject to the terms of this compact, the rules adopted by the Interstate Commission and policies adopted by the State Council under this compact.

(4) 'Compacting state' means any state which has enacted the enabling legislation for this compact.

(5) 'Commissioner' means the voting representative of each compacting state appointed pursuant to Article III of this compact.

(6) 'Interstate Commission' means the Interstate Commission for Adult Offender Supervision established by this compact.

(7) 'Member' means the commissioner of a compacting state or designee, who shall be a person officially connected with the commissioner.

(8) 'Noncompacting state' means any state which has not enacted the enabling legislation for this compact.

(9) 'Offender' means an adult placed under, or subject, to supervision as the result of the commission of a criminal offense and released to the community under the jurisdiction of courts, paroling authorities, corrections, or other criminal justice agencies.

(10) 'Person' means any individual, corporation, business enterprise, or other legal entity, either public or private.

(11) 'Rules' means acts of the Interstate Commission, duly promulgated pursuant to Article VIII of this compact, substantially affecting interested parties in addition to the Interstate Commission, which shall have the force and effect of law in the compacting states.

(12) 'State' means a state of the United States, the District of Columbia and any other territorial possessions of the United States.

(13) 'State Council' means the resident members of the State Council for Interstate Adult Offender Supervision created by each state under Article III of this compact.

### ARTICLE III.

#### THE COMPACT COMMISSION.

The compacting states hereby create the 'Interstate Commission for Adult Offender Supervision.' The Interstate Commission shall be a body corporate and joint agency of the compacting states. The Interstate Commission shall have all the responsibilities, powers and duties set forth herein, including the power to sue and be sued, and such

additional powers as may be conferred upon it by subsequent action of the respective legislatures of the compacting states in accordance with the terms of this compact.

The Interstate Commission shall consist of Commissioners selected and appointed by resident members of a State Council for Interstate Adult Offender Supervision for each state.

In addition to the Commissioners who are the voting representatives of each state, the Interstate Commission shall include individuals who are not commissioners but who are members of interested organizations; such non-commissioner members must include a member of the national organizations of governors, legislators, state chief justices, attorneys general and crime victims. All non-commissioner members of the Interstate Commission shall be ex-officio (nonvoting) members. The Interstate Commission may provide in its by-laws for such additional, ex-officio, non-voting members as it deems necessary.

Each compacting state represented at any meeting of the Interstate Commission is entitled to one vote. A majority of the compacting states shall constitute a quorum for the transaction of business, unless a larger quorum is required by the by-laws of the Interstate Commission.

The Interstate Commission shall meet at least once each calendar year. The chairperson may call additional meetings and, upon the request of 27 or more compacting states, shall call additional meetings. Public notice shall be given of all meetings and meetings shall be open to the public.

The Interstate Commission shall establish an Executive Committee which shall include commission officers, members and others as shall be determined by the By-laws. The Executive Committee shall have the power to act on behalf of the Interstate Commission during periods when the Interstate Commission is not in session, with the exception of rulemaking and/or amendment to the Compact. The Executive Committee oversees the day-to-day activities managed by the Executive Director and Interstate Commission staff; administers enforcement and compliance with the provisions of the compact, its by-laws and as directed by the Interstate Commission and performs other duties as directed by Commission or set forth in the By-laws.

#### ARTICLE IV.

#### THE STATE COUNCIL.

Each member state shall create a State Council for Interstate Adult Offender Supervision which shall be responsible for the appointment of the commissioner who shall serve on the Interstate Commission from that state. Each state council shall appoint as its commissioner the Compact Administrator from that state to serve on the Interstate

Commission in such capacity under or pursuant to applicable law of the member state. While each member state may determine the membership of its own state council, its membership must include at least one representative from the legislative, judicial, and executive branches of government, victims groups and compact administrators. Each compacting state retains the right to determine the qualifications of the Compact Administrator who shall be appointed by the state council or by the Governor in consultation with the Legislature and the Judiciary. In addition to appointment of its commissioner to the National Interstate Commission, each state council shall exercise oversight and advocacy concerning its participation in Interstate Commission activities and other duties as may be determined by each member state including but not limited to, development of policy concerning operations and procedures of the compact within that state.

#### ARTICLE V.

### POWERS AND DUTIES OF THE INTERSTATE COMMISSION.

The Interstate Commission shall have the following powers:

- (1) To adopt a seal and suitable by-laws governing the management and operation of the Interstate Commission.
- (2) To promulgate rules which shall have the force and effect of statutory law and shall be binding in the compacting states to the extent and in the manner provided in this compact.
- (3) To oversee, supervise and coordinate the interstate movement of offenders subject to the terms of this compact and any by-laws adopted and rules promulgated by the compact commission.
- (4) To enforce compliance with compact provisions, Interstate Commission rules, and by-laws, using all necessary and proper means, including but not limited to, the use of judicial process.
- (5) To establish and maintain offices.
- (6) To purchase and maintain insurance and bonds.
- (7) To borrow, accept, or contract for services of personnel, including, but not limited to, members and their staffs.
- (8) To establish and appoint committees and hire staff which it deems necessary for the carrying out of its functions including, but not limited to, an executive committee as required by Article III which shall have the power to act on behalf of the Interstate Commission in carrying out its powers and duties hereunder.
- (9) To elect or appoint such officers, attorneys, employees, agents, or consultants, and to fix their compensation, define their duties and



determine their qualifications; and to establish the Interstate Commission's personnel policies and programs relating to, among other things, conflicts of interest, rates of compensation, and qualifications of personnel.

(10) To accept any and all donations and grants of money, equipment, supplies, materials, and services, and to receive, utilize, and dispose of same.

(11) To lease, purchase, accept contributions or donations of, or otherwise to own, hold, improve or use any property, real, personal, or mixed.

(12) To sell, convey, mortgage, pledge, lease, exchange, abandon, or otherwise dispose of any property, real, personal or mixed.

(13) To establish a budget and make expenditures and levy dues as provided in Article X of this compact.

(14) To sue and be sued.

(15) To provide for dispute resolution among Compacting States.

(16) To perform such functions as may be necessary or appropriate to achieve the purposes of this compact.

(17) To report annually to the legislatures, governors, judiciary, and state councils of the compacting states concerning the activities of the Interstate Commission during the preceding year. Such reports shall also include any recommendations that may have been adopted by the Interstate Commission.

(18) To coordinate education, training and public awareness regarding the interstate movement of offenders for officials involved in such activity.

(19) To establish uniform standards for the reporting, collecting, and exchanging of data.

## ARTICLE VI.

### ORGANIZATION AND OPERATION OF

### THE INTERSTATE COMMISSION.

#### Section A. By-laws

The Interstate Commission shall, by a majority of the Members, within twelve months of the first Interstate Commission meeting, adopt By-laws to govern its conduct as may be necessary or appropriate to carry out the purposes of the Compact, including, but not limited to: establishing the fiscal year of the Interstate Commission; establishing

an executive committee and such other committees as may be necessary; providing reasonable standards and procedures:

(1) For the establishment of committees, and

(2) Governing any general or specific delegation of any authority or function of the Interstate Commission;

providing reasonable procedures for calling and conducting meetings of the Interstate Commission, and ensuring reasonable notice of each such meeting; establishing the titles and responsibilities of the officers of the Interstate Commission; providing reasonable standards and procedures for the establishment of the personnel policies and programs of the Interstate Commission. Notwithstanding any civil service or other similar laws of any Compacting State, the By-laws shall exclusively govern the personnel policies and programs of the Interstate Commission; and providing a mechanism for winding up the operations of the Interstate Commission and the equitable return of any surplus funds that may exist upon the termination of the Compact after the payment and/or reserving of all of its debts and obligations; providing transition rules for 'start up' administration of the compact; establishing standards and procedures for compliance and technical assistance in carrying out the compact.

#### Section B. Officers and Staff

The Interstate Commission shall, by a majority of the Members, elect from among its Members a chairperson and a vice chairperson, each of whom shall have such authorities and duties as may be specified in the By-laws. The chairperson or, in his or her absence or disability, the vice chairperson, shall preside at all meetings of the Interstate Commission. The Officers so elected shall serve without compensation or remuneration from the Interstate Commission; provided that, subject to the availability of budgeted funds, the officers shall be reimbursed for any actual and necessary costs and expenses incurred by them in the performance of their duties and responsibilities as officers of the Interstate Commission. The Interstate Commission shall, through its executive committee, appoint or retain an executive director for such period, upon such terms and conditions and for such compensation as the Interstate Commission may deem appropriate. The executive director shall serve as secretary to the Interstate Commission, and hire and supervise such other staff as may be authorized by the Interstate Commission, but shall not be a member.

#### Section C. Corporate Records of the Interstate Commission

The Interstate Commission shall maintain its corporate books and records in accordance with the By-laws.

#### Section D. Qualified Immunity, Defense and Indemnification

The Members, officers, executive director and employees of the Interstate Commission shall be immune from suit and liability, either personally or in their official capacity, for any claim for damage to or loss of property or personal injury or other civil liability caused or arising out of any actual or alleged act, error or omission that occurred within the scope of Interstate Commission employment, duties or responsibilities; provided, that nothing in this paragraph shall be construed to protect any such person from suit and/or liability for any damage, loss, injury or liability caused by the intentional or willful and wanton misconduct of any such person. The Interstate Commission shall defend the Commissioner of a Compacting State, or his or her representatives or employees, or the Interstate Commission's representatives or employees, in any civil action seeking to impose liability, arising out of any actual or alleged act, error or omission that occurred within the scope of Interstate Commission employment, duties or responsibilities, or that the defendant had a reasonable basis for believing occurred within the scope of Interstate Commission employment, duties or responsibilities; provided, that the actual or alleged act, error or omission did not result from intentional wrongdoing on the part of such person. The Interstate Commission shall indemnify and hold the Commissioner of a Compacting State, the appointed designee or employees, or the Interstate Commission's representatives or employees, harmless in the amount of any settlement or judgement obtained against such persons arising out of any actual or alleged act, error or omission that occurred within the scope of Interstate Commission employment, duties or responsibilities, or that such persons had a reasonable basis for believing occurred within the scope of Interstate Commission employment, duties or responsibilities, provided, that the actual or alleged act, error or omission did not result from gross negligence or intentional wrongdoing on the part of such person.

## ARTICLE VII.

### ACTIVITIES OF THE INTERSTATE COMMISSION.

The Interstate Commission shall meet and take such actions as are consistent with the provisions of this Compact.

Except as otherwise provided in this Compact and unless a greater percentage is required by the By-laws, in order to constitute an act of the Interstate Commission, such act shall have been taken at a meeting of the Interstate Commission and shall have received an affirmative vote of a majority of the members present.

Each Member of the Interstate Commission shall have the right and power to cast a vote to which that Compacting State is entitled and to participate in the business and affairs of the Interstate Commission. A Member shall vote in person on behalf of the state and shall not



delegate a vote to another member state. However, a State Council shall appoint another authorized representative, in the absence of the commissioner from that state, to cast a vote on behalf of the member state at a specified meeting. The By-laws may provide for Members' participation in meetings by telephone or other means of telecommunication or electronic communication. Any voting conducted by telephone, or other means of telecommunication or electronic communication shall be subject to the same quorum requirements of meetings where members are present in person.

The Interstate Commission shall meet at least once during each calendar year. The chairperson of the Interstate Commission may call additional meetings at any time and, upon the request of a majority of the Members, shall call additional meetings.

The Interstate Commission's By-laws shall establish conditions and procedures under which the Interstate Commission shall make its information and official records available to the public for inspection or copying. The Interstate Commission may exempt from disclosure any information or official records to the extent they would adversely affect personal privacy rights or proprietary interests. In promulgating such Rules, the Interstate Commission may make available to law enforcement agencies records and information otherwise exempt from disclosure, and may enter into agreements with law enforcement agencies to receive or exchange information or records subject to nondisclosure and confidentiality provisions.

Public notice shall be given of all meetings and all meetings shall be open to the public, except as set forth in the Rules or as otherwise provided in the Compact. The Interstate Commission shall promulgate Rules consistent with the principles contained in the 'Government in Sunshine Act,' 5 U.S.C. Section 552(b), as may be amended. The Interstate Commission and any of its committees may close a meeting to the public where it determines by two-thirds vote that an open meeting would be likely to:

- (1) Relate solely to the Interstate Commission's internal personnel practices and procedures;
- (2) Disclose matters specifically exempted from disclosure by statute;
- (3) Disclose trade secrets or commercial or financial information which is privileged or confidential;
- (4) Involve accusing any person of a crime, or formally censuring any person;
- (5) Disclose information of a personal nature where disclosure would constitute a clearly unwarranted invasion of personal privacy;

(6) Disclose investigatory records compiled for law enforcement purposes;

(7) Disclose information contained in or related to examination, operating or condition reports prepared by, or on behalf of or for the use of, the Interstate Commission with respect to a regulated entity for the purpose of regulation or supervision of such entity;

(8) Disclose information, the premature disclosure of which would significantly endanger the life of a person or the stability of a regulated entity;

(9) Specifically relate to the Interstate Commission's issuance of a subpoena, or its participation in a civil action or proceeding.

For every meeting closed pursuant to this provision, the Interstate Commission's chief legal officer shall publicly certify that, in his or her opinion, the meeting may be closed to the public, and shall reference each relevant exemptive provision. The Interstate Commission shall keep minutes which shall fully and clearly describe all matters discussed in any meeting and shall provide a full and accurate summary of any actions taken, and the reasons therefor, including a description of each of the views expressed on any item and the record of any rollcall vote (reflected in the vote of each Member on the question). All documents considered in connection with any action shall be identified in such minutes.

The Interstate Commission shall collect standardized data concerning the interstate movement of offenders as directed through its By-laws and Rules which shall specify the data to be collected, the means of collection and data exchange and reporting requirements.

## ARTICLE VIII.

### RULEMAKING FUNCTIONS OF THE INTERSTATE COMMISSION.

The Interstate Commission shall promulgate Rules in order to effectively and efficiently achieve the purposes of the Compact including transition rules governing administration of the compact during the period in which it is being considered and enacted by the states.

Rulemaking shall occur pursuant to the criteria set forth in this Article and the By-laws and Rules adopted pursuant thereto. Such rulemaking shall substantially conform to the principles of the federal Administrative Procedure Act, 5 U.S.C.S. Section 551, et seq., and the Federal Advisory Committee Act, 5 U.S.C.S. app. 2, Section 1, et seq., as may be amended (hereinafter 'APA').

All Rules and amendments shall become binding as of the date specified in each Rule or amendment.

If a majority of the legislatures of the Compacting States rejects a Rule, by enactment of a statute or resolution in the same manner used to adopt the compact, then such Rule shall have no further force and effect in any Compacting State.

When promulgating a Rule, the Interstate Commission shall:

- (1) Publish the proposed Rule stating with particularity the text of the Rule which is proposed and the reason for the proposed Rule;
- (2) Allow persons to submit written data, facts, opinions and arguments, which information shall be publicly available;
- (3) Provide an opportunity for an informal hearing; and
- (4) Promulgate a final Rule and its effective date, if appropriate, based on the rulemaking record.

Not later than sixty days after a Rule is promulgated, any interested person may file a petition in the United States District Court for the District of Columbia or in the Federal District Court where the Interstate Commission's principal office is located for judicial review of such Rule. If the court finds that the Interstate Commission's action is not supported by substantial evidence, as defined in the APA, in the rulemaking record, the court shall hold the Rule unlawful and set it aside.

Subjects to be addressed within 12 months after the first meeting must at a minimum include:

- (1) Notice to victims and opportunity to be heard;
- (2) Offender registration and compliance;
- (3) Violations/returns;
- (4) Transfer procedures and forms;
- (5) Eligibility for transfer;
- (6) Collection of restitution and fees from offenders;
- (7) Data collection and reporting;
- (8) The level of supervision to be provided by the receiving state;
- (9) Transition rules governing the operation of the compact and the Interstate Commission during all or part of the period between the effective date of the compact and the date on which the last eligible state adopts the compact;
- (10) Mediation, arbitration and dispute resolution.

The existing rules governing the operation of the previous compact superseded by this Act shall be null and void twelve (12) months after the first meeting of the Interstate Commission created hereunder.



Upon determination by the Interstate Commission that an emergency exists, it may promulgate an emergency rule which shall become effective immediately upon adoption, provided that the usual rulemaking procedures provided hereunder shall be retroactively applied to said rule as soon as reasonably possible, in no event later than 90 days after the effective date of the rule.

## ARTICLE IX.

### OVERSIGHT, ENFORCEMENT, AND

### DISPUTE RESOLUTION BY THE INTERSTATE COMMISSION.

#### Section A. Oversight

The Interstate Commission shall oversee the interstate movement of adult offenders in the compacting states and shall monitor such activities being administered in Non-compacting States which may significantly affect Compacting States.

The courts and executive agencies in each Compacting State shall enforce this Compact and shall take all actions necessary and appropriate to effectuate the Compact's purposes and intent. In any judicial or administrative proceeding in a Compacting State pertaining to the subject matter of this Compact which may affect the powers, responsibilities or actions of the Interstate Commission, the Interstate Commission shall be entitled to receive all service of process in any such proceeding, and shall have standing to intervene in the proceeding for all purposes.

#### Section B. Dispute Resolution

The Compacting States shall report to the Interstate Commission on issues or activities of concern to them, and cooperate with and support the Interstate Commission in the discharge of its duties and responsibilities.

The Interstate Commission shall attempt to resolve any disputes or other issues which are subject to the Compact and which may arise among Compacting States and Noncompacting States.

The Interstate Commission shall enact a By-law or promulgate a Rule providing for both mediation and binding dispute resolution for disputes among the Compacting States.

#### Section C. Enforcement

The Interstate Commission, in the reasonable exercise of its discretion, shall enforce the provisions of this compact using any or all means set forth in Article XII, Section B, of this compact.

#### Section D. Extradition

In accordance with the laws of the United States, the duly accredited officers of a sending state may at all times enter a receiving state and there apprehend and retake any offender. For that purpose no formalities will be required other than establishing the authority of the officer and the identity of the offender to be retaken. All legal requirements to extradition of fugitives from justice are hereby expressly waived on the part of states party hereto, as to such offenders. The decision of the sending state to retake an offender shall be conclusive upon and not reviewable within the receiving state; however, if at the time when a state seeks to retake an offender there should be pending against the offender within the receiving state any criminal charge, or if the offender should be suspected of having committed within such state a criminal offense, the offender shall not be retaken without the consent of the receiving state until discharged from prosecution or from imprisonment for such offense. The duly accredited officers of the sending state will be permitted to transport prisoners being retaken through any and all states that are parties to this compact without interference.

## ARTICLE X.

### FINANCE.

The Interstate Commission shall pay or provide for the payment of the reasonable expenses of its establishment, organization and ongoing activities.

The Interstate Commission shall levy on and collect an annual assessment from each Compacting State to cover the cost of the internal operations and activities of the Interstate Commission and its staff which must be in a total amount sufficient to cover the Interstate Commission's annual budget as approved each year. The aggregate annual assessment amount shall be allocated based upon a formula to be determined by the Interstate Commission, taking into consideration the population of the state and the volume of interstate movement of offenders in each Compacting State and shall promulgate a Rule binding upon all Compacting States which governs said assessment.

The Interstate Commission shall not incur any obligations of any kind prior to securing the funds adequate to meet the same; nor shall the Interstate Commission pledge the credit of any of the compacting states, except by and with the authority of the compacting state.

The Interstate Commission shall keep accurate accounts of all receipts and disbursements. The receipts and disbursements of the Interstate Commission shall be subject to the audit and accounting procedures established under its By-laws. However, all receipts and disbursements of funds handled by the Interstate Commission shall be audited yearly by a certified or licensed public accountant and the

report of the audit shall be included in and become part of the annual report of the Interstate Commission.

## ARTICLE XI.

### COMPACTING STATES, EFFECTIVE DATE AND AMENDMENT.

Any state, as defined in Article II of this compact, is eligible to become a Compacting State.

The Compact shall become effective and binding upon legislative enactment of the Compact into law by no less than 35 of the States. The initial effective date shall be the later of July 1, 2002, or upon enactment into law by the thirty-fifth jurisdiction. Thereafter it shall become effective and binding, as to any other Compacting State, upon enactment of the Compact into law by that State. The governors of Non-member states or their designees will be invited to participate in Interstate Commission activities on a non-voting basis prior to adoption of the compact by all states and territories of the United States.

Amendments to the Compact may be proposed by the Interstate Commission for enactment by the Compacting States. No amendment shall become effective and binding upon the Interstate Commission and the Compacting States unless and until it is enacted into law by unanimous consent of the Compacting States.

## ARTICLE XII.

### WITHDRAWAL, DEFAULT, TERMINATION, AND JUDICIAL ENFORCEMENT

#### Section A. Withdrawal

Once effective, the Compact shall continue in force and remain binding upon each and every Compacting State; provided, that a Compacting State may withdraw from the Compact ('Withdrawing State') by enacting a statute specifically repealing the statute which enacted the Compact into law.

The effective date of withdrawal is the effective date of the repeal.

The Withdrawing State shall immediately notify the Chairperson of the Interstate Commission in writing upon the introduction of legislation repealing this Compact in the Withdrawing State.

The Interstate Commission shall notify the other Compacting States of the Withdrawing State's intent to withdraw within sixty days of its receipt thereof.



The Withdrawing State is responsible for all assessments, obligations and liabilities incurred through the effective date of withdrawal, including any obligations, the performance of which extend beyond the effective date of withdrawal. Reinstatement following withdrawal of any Compacting State shall occur upon the Withdrawing State reenacting the Compact or upon such later date as determined by the Interstate Commission.

### Section B. Default

If the Interstate Commission determines that any Compacting State has at any time defaulted ('Defaulting State') in the performance of any of its obligations or responsibilities under this Compact, the By-laws or any duly promulgated Rules the Interstate Commission may impose any or all of the following penalties:

(1) Fines, fees and costs in such amounts as are deemed to be reasonable as fixed by the Interstate Commission;

(2) Remedial training and technical assistance as directed by the Interstate Commission;

(3) Suspension and termination of membership in the compact. Suspension shall be imposed only after all other reasonable means of securing compliance under the By-laws and Rules have been exhausted. Immediate notice of suspension shall be given by the Interstate Commission to the Governor, the Chief Justice or Chief Judicial Officer of the state; the majority and minority leaders of the defaulting state's legislature, and the State Council.

The grounds for default include, but are not limited to, failure of a Compacting State to perform such obligations or responsibilities imposed upon it by this compact, Interstate Commission By-laws, or duly promulgated Rules. The Interstate Commission shall immediately notify the Defaulting State in writing of the penalty imposed by the Interstate Commission on the Defaulting State pending a cure of the default. The Interstate Commission shall stipulate the conditions and the time period within which the Defaulting State must cure its default. If the Defaulting State fails to cure the default within the time period specified by the Interstate Commission, in addition to any other penalties imposed herein, the Defaulting State may be terminated from the Compact upon an affirmative vote of a majority of the Compacting States and all rights, privileges and benefits conferred by this Compact shall be terminated from the effective date of suspension.

Within sixty days of the effective date of termination of a Defaulting State, the Interstate Commission shall notify the Governor, the Chief Justice or Chief Judicial Officer and the Majority and Minority Leaders of the Defaulting State's legislature and the state council of such termination.

The Defaulting State is responsible for all assessments, obligations and liabilities incurred through the effective date of termination including any obligations, the performance of which extends beyond the effective date of termination.

The Interstate Commission shall not bear any costs relating to the Defaulting State unless otherwise mutually agreed upon between the Interstate Commission and the Defaulting State.

Reinstatement following termination of any Compacting State requires both a reenactment of the Compact by the Defaulting State and the approval of the Interstate Commission pursuant to the Rules.

#### Section C. Judicial Enforcement

The Interstate Commission may, by majority vote of the Members, initiate legal action in the United States District Court for the District of Columbia or, at the discretion of the Interstate Commission, in the Federal District where the Interstate Commission has its offices to enforce compliance with the provisions of the Compact, its duly promulgated Rules and By-laws, against any Compacting State in default. In the event judicial enforcement is necessary the prevailing party shall be awarded all costs of such litigation including reasonable attorneys fees.

#### Section D. Dissolution of Compact

The Compact dissolves effective upon the date of the withdrawal or default of the Compacting State which reduces membership in the Compact to one Compacting State.

Upon the dissolution of this Compact, the Compact becomes null and void and shall be of no further force or effect, and the business and affairs of the Interstate Commission shall be wound up and any surplus funds shall be distributed in accordance with the By-laws.

### ARTICLE XIII.

#### SEVERABILITY AND CONSTRUCTION.

The provisions of this Compact shall be severable, and if any phrase, clause, sentence or provision is deemed unenforceable, the remaining provisions of the Compact shall be enforceable.

The provisions of this Compact shall be liberally constructed to effectuate its purposes.

## ARTICLE XIV.

## BINDING EFFECT OF COMPACT AND OTHER LAWS.

## Section A. Other Laws

Nothing herein prevents the enforcement of any other law of a Compacting State that is not inconsistent with this Compact.

All Compacting States' laws conflicting with this Compact are superseded to the extent of the conflict.

## Section B. Binding Effect of the Compact

All lawful actions of the Interstate Commission, including all Rules and By-laws promulgated by the Interstate Commission, are binding upon the Compacting States.

All agreements between the Interstate Commission and the Compacting States are binding in accordance with their terms.

Upon the request of a party to a conflict over meaning or interpretation of Interstate Commission actions, and upon a majority vote of the Compacting States, the Interstate Commission may issue advisory opinions regarding such meaning or interpretation.

In the event any provision of this Compact exceeds the constitutional limits imposed on the legislature of any Compacting State, the obligations, duties, powers or jurisdiction sought to be conferred by such provision upon the Interstate Commission shall be ineffective and such obligations, duties, powers or jurisdiction shall remain in the Compacting State and shall be exercised by the agency thereof to which such obligations, duties, powers or jurisdiction are delegated by law in effect at the time this Compact becomes effective." (Code 1981, § 42-9-81, enacted by Ga. L. 2002, p. 1297, § 1.)

**Code Commission notes.** — Pursuant to Code Section 28-9-5, in 2002, quotes were added preceding "Article 1" near the beginning and following "this Compact becomes effective" at the end, punctuation

was revised throughout, under Article II, paragraphs (8) through (12) were redesignated as (9) through (13), respectively, and under Article IX, Section C, "its" was substituted for "its".

**42-9-82. Powers of Governor with respect to compact.**

With respect to the Interstate Compact for Adult Offender Supervision set out in Code Section 42-9-81:

(1) The Governor shall by executive order establish the initial composition, terms, and compensation of the Georgia State Council for Interstate Adult Offender Supervision required by Article IV of that compact, with the Governor making the appointments to those positions; except that any appointment to a position representing the



legislative branch shall be made jointly by the Speaker of the House of Representatives and the President of the Senate and any appointment to a position representing the judicial branch shall be made by the Chief Justice of the Supreme Court;

(2) The Governor shall by executive order establish the qualifications, term, and compensation of the compact administrator required by Article IV of that compact, with the state council making the appointment of the compact administrator;

(3) The Governor shall by executive order provide for any other matters necessary for implementation of the compact at the time that it becomes effective; and

(4) Except as otherwise provided for in this Code section, the board may promulgate rules or regulations necessary to implement and administer the compact, subject to the provisions of Chapter 13 of Title 50, the "Georgia Administrative Procedure Act." (Code 1981, § 42-9-82, enacted by Ga. L. 2002, p. 1297, § 1.)

## ARTICLE 5

### FEES

**Effective date.** — This article became effective May 31, 2003.

#### **42-9-90. Application fee required for transfer consideration.**

(a) As used in this Code section, the term:

(1) "Adult" means both individuals legally classified as adults and juveniles treated as adults by court order, statute, or operation of law.

(2) "Offender" means an adult placed under, or subject to supervision as the result of the commission of a criminal offense and released to the community under the jurisdiction of courts, paroling authorities, corrections, or other criminal justice agencies.

(3) "State" means a state of the United States, the District of Columbia, or any other territorial possessions of the United States.

(b) The Department of Corrections and the State Board of Pardons and Paroles are authorized to require any nonindigent adult offender to pay a \$25.00 application fee when applying to transfer his or her supervision from Georgia to any other state or territory pursuant to the provisions of Articles 3 and 4 of this chapter. (Code 1981, § 42-9-90, enacted by Ga. L. 2003, p. 477, § 1.)

**CHAPTER 10****CORRECTIONAL INDUSTRIES**

Sec.

42-10-4. Powers of administration.

**42-10-4. Powers of administration.**

The administration shall have, in addition to any other powers conferred by this chapter, the following powers:

(1) To have a seal and alter the same at pleasure;

(2) To acquire by purchase, lease, or otherwise and to hold, lease, and dispose of, in any manner, real and personal property of every kind and character for its corporate purposes;

(3) To appoint, upon the recommendations of its chief executive officer, such additional officers, agents, and employees as may, in its judgment, be necessary to carry on the business of the administration; to fix the compensation for such officers and employees; and to promote and discharge the same. However, all legal services for the administration shall be rendered by the Attorney General and his staff and no fee shall be paid to any attorney or law firm for legal services. The administration shall be authorized to pay such fees, stamps, and licenses and any court costs that may be incurred by virtue of the powers granted in this Code section;

(4) To have the same powers and authority possessed by the Department of Corrections in connection with the manufacture and sale of products and provision of services;

(5) To utilize any and all inmates who may be made available for its corporate purposes by the Department of Corrections. The administration shall not be required to make any payment to the Department of Corrections for the use of such labor and shall not compensate inmates employed in any industry or performing services at any correctional institution, except as otherwise provided by Article 6 of Chapter 5 of this title;

(6) To retain its earnings for expenditure upon any lawful purpose of the administration;

(6.1) To conduct vocational training of inmates without regard to their industrial or other assignment;

(6.2) To construct, erect, install, equip, repair, replace, maintain, and operate facilities of every character, consistent with its purposes; provided, however, that the Department of Corrections may not

contract with the administration to transfer to it any capital outlay appropriations unless the appropriation was by line item expressly designating such a purpose; provided, further, the warehouse, the construction of which commenced in DeKalb County in 1988 by the administration, and all other facilities of the administration presently completed are ratified and approved;

(7) To turn any surplus over to the state treasury in the event that the administration shall accumulate a surplus in excess of the amount necessary for the efficient operation of the programs authorized by this chapter, except that an amount not to exceed 20 percent of that part of such surplus earnings as may be attributable to the production or services effort of any given production or other facility operated by or under the jurisdiction or supervision of the administration shall be creditable to the operating budget of the state operated penal institution upon which the production facility or services activity was based;

(8) To borrow money and to pledge any or all property owned by the administration as security therefor;

(9) To receive from any source, including, but not limited to, the state, municipalities and political subdivisions of the state, and the federal government, gifts and grants for its corporate purposes;

(10) To hold, use, administer, and expend such sum or sums as may be appropriated by authority of the General Assembly or the Office of Planning and Budget for any of the purposes of the administration;

(11) To provide training facilities for the prerelease rehabilitation and education of inmates confined in the state penal system;

(12) To contract with any department, agency, or instrumentality of the state and any political subdivision thereof for the furnishing of any service which the Department of Corrections may provide; and

(13) As provided for in Article 6 of Chapter 5 of Title 42 and as directed by the rules and regulations promulgated by the board, to administer and manage volunteer inmate work programs and to publicize and invite employers to participate in such programs. (Ga. L. 1960, p. 880, § 4; Ga. L. 1968, p. 1011, § 1; Ga. L. 1973, p. 1300, § 1; Ga. L. 1975, p. 1163, § 1; Ga. L. 1983, p. 1795, § 1; Ga. L. 1985, p. 283, § 1; Ga. L. 1989, p. 415, § 2; Ga. L. 1991, p. 94, § 42; Ga. L. 2005, p. 1222, § 5/HB 58; Ga. L. 2007, p. 224, § 6/HB 313.)

**The 2005 amendment**, effective July 1, 2005, in paragraph (4), added “and provision of services” to the end; and in paragraph (5), added “, except as otherwise provided by Article 6 of Chapter 5 of this title” to the end.

**The 2007 amendment**, effective May 18, 2007, deleted “and” at the end of paragraph (11), substituted “; and” for a period at the end of paragraph (12), and added paragraph (13).

**Editor’s notes.** — Ga. L. 2005, p. 1222,



§ 1, not codified by the General Assembly, provides that: "This Act shall be known and may be cited as the 'Working Against Recidivism Act.'"

Ga. L. 2005, p. 1222, § 2, not codified by the General Assembly, provides that: "The General Assembly finds and declares that:

"(1) Many persons sentenced to confinement for criminal offenses commit additional criminal offenses after release from confinement, and such recidivism is a serious danger to public safety and a major source of expense to the state;

"(2) Under the appropriate conditions and limitations, work programs of voluntary labor by inmates of state and county correctional institutions for privately owned profit-making employers to produce goods, services, or goods and services for sale to public or private purchasers provide substantial public benefits by:

"(A) Providing job experience and skills to participating inmates;

"(B) Allowing participating inmates to accumulate savings available for their use when released from the correctional institution;

"(C) Lowering recidivism rates;

"(D) Generating taxes from inmate income;

"(E) Reducing the cost of incarceration by enabling participating inmates to pay room and board; and

"(F) Providing participating inmates income to pay fines, restitution, and family support;

"(3) Appropriate conditions and limitations for voluntary labor by inmates for such work programs include but are not limited to:

"(A) Assurance that inmates' work is voluntary;

"(B) Payment of inmates at wages at a rate not less than that paid for work of a similar nature in the locality in which the work is to be performed;

"(C) Provision of federal and state governmental benefits to participating inmates comparable to governmental benefits provided for similarly situated private sector workers;

"(D) Selection of participating inmates with careful attention to security issues;

"(E) Appropriate supervision of inmates during travel or employment outside the correctional institution;

"(F) Assurance that inmate labor will not result in the displacement of employed workers; be applied in skills, crafts, or trades in which there is a surplus of available gainful labor in the locality; or impair existing contracts for services;

"(G) Consultations with local private employers that may be economically impacted; and

"(H) Consultations with local labor union organizations and other local employee groups, especially those who have an interest in the trade or skill to be performed by the inmates; and

"(4) Requirements for the federal Prison Industry Enhancement Certification Program authorized by 18 U.S.C. Section 1761 and federal regulations are sufficient to ensure appropriate conditions and limitations in many areas of concern for programs of voluntary labor by inmates for privately owned profit-making employers to produce goods, services, or goods and services for sale to public and private purchasers."

CHAPTER 11

INTERSTATE CORRECTIONS COMPACT

42-11-1. Short title.

RESEARCH REFERENCES

**ALR.** — Validity, construction, and application of interstate corrections compact and implementing state laws — jurisdictional issues, governing law, and validity and applicability of compact, 54 ALR6th 1.

42-11-2. Enactment and text of compact.

RESEARCH REFERENCES

**ALR.** — Validity, construction, and application of interstate corrections compact and implementing state laws — jurisdictional issues, governing law, and validity and applicability of compact, 54 ALR6th 1.

42-11-3. Powers and duties of Department of Corrections to carry out compact.

RESEARCH REFERENCES

**ALR.** — Validity, construction, and application of interstate corrections compact and implementing state laws — jurisdictional issues, governing law, and validity and applicability of compact, 54 ALR6th 1.

CHAPTER 12

PRISON LITIGATION REFORM

Sec.	Sec.
42-12-3. Definitions.	42-12-7.2. Number of forma pauperis actions limited.
42-12-7.1. Payment of fees from prisoner's inmate account upon filing of habeas corpus petition.	

42-12-1. Short title.

JUDICIAL DECISIONS

**Blanket declaration forbidden.** — The constitution forbids courts to abridge inmates' rights to have meaningful access to and communications with the courts, and a blanket declaration that all filings would be "null and void by operation of law" was impermissible. *Hooper v. Harris*, 236 Ga. App. 651, 512 S.E.2d 312 (1999). **Cited in** *In re B.A.S.*, 254 Ga. App. 430, 563 S.E.2d 141 (2002); *Heard v. Ashcroft*,

No. 603CV060, 2003 U.S. Dist. LEXIS 26741 (S.D. Ga. June 6, 2003).

### RESEARCH REFERENCES

**ALR.** — Attorney's fees awards under (42 U.S.C.A § 1997e(d)), 165 ALR Fed. § 803(d) of Prison Litigation Reform Act 551.

## 42-12-2. Legislative findings and determinations.

### JUDICIAL DECISIONS

**Cited in** Ray v. Barber, 273 Ga. 856, 548 S.E.2d 283 (2001).

## 42-12-3. Definitions.

As used in this chapter, the term:

(1) "Action" means any civil lawsuit, action, or proceeding, including an appeal, filed by a prisoner but shall not include an appeal of a criminal proceeding; provided, however, that the provisions of Code Sections 42-12-4 through 42-12-7 shall not apply to petitions for writ of habeas corpus.

(2) "Court costs and fees" means the initial filing fee set by the clerk of court and all fees incident to service of the lawsuit or amendments.

(3) "Indigent prisoner" means a prisoner who has insufficient funds in the prisoner's inmate account at the time of filing to pay the appropriate filing fee.

(4) "Prisoner" means a person 17 years of age or older who has been convicted of a crime and is presently incarcerated or is being held in custody awaiting trial or sentencing. (Code 1981, § 42-12-3, enacted by Ga. L. 1996, p. 400, § 1; Ga. L. 1999, p. 847, § 1.)

**The 1999 amendment**, effective July 1, 1999, substituted the present provisions of paragraph (1) for the former provisions, which read: "Action" means any civil lawsuit, action, or proceeding, including an appeal, filed by a prisoner but shall

not include: (A) A petition for writ of habeas corpus; or (B) An appeal of a criminal proceeding."

**Law reviews.** — For note on 1999 amendment to this Code section, see 16 Ga. St. U.L. Rev. 219 (1999).

### JUDICIAL DECISIONS

**Cited in** In re K.W., 233 Ga. App. 140, 503 S.E.2d 394 (1998).



**42-12-7.1. Payment of fees from prisoner's inmate account upon filing of habeas corpus petition.**

The following provisions shall apply when an indigent prisoner files a petition for habeas corpus:

(1) The indigent prisoner shall pay the current balance of funds in the prisoner's inmate account;

(2) The clerk of court shall notify the superintendent of the institution in which the prisoner is incarcerated that a petition for habeas corpus has been filed. Notice to the superintendent shall include:

(A) The prisoner's name, inmate number, and civil action number; and

(B) The amount of the court costs and fees due and payable; and

(3) Upon notification by the clerk of court that an indigent prisoner has filed a petition for habeas corpus, the superintendent shall:

(A) Immediately freeze the prisoner's inmate account; and

(B) Order that all moneys deposited into the prisoner's inmate account be forwarded to the clerk until all court costs and fees are satisfied, whereupon the freezing of the account shall be terminated. (Code 1981, § 42-12-7.1, enacted by Ga. L. 1999, p. 847, § 2.)

**Effective date.** — This Code section became effective July 1, 1999.

**Cross references.** — Habeas corpus, Ga. Const. 1983, Art. 1, Sec. 1, Para. 15. Habeas corpus, Ch. 14, T. 9.

**Law reviews.** — For note on 1999 enactment of this section, see 16 Ga. St. U.L. Rev. 219 (1999).

**42-12-7.2. Number of forma pauperis actions limited.**

In no event shall a prisoner file any action in forma pauperis in any court of this state if the prisoner has, on three or more prior occasions while he or she was incarcerated or detained in any facility, filed any action in any court of this state that was subsequently dismissed on the grounds that such action was frivolous or malicious, unless the prisoner is under imminent danger of serious physical injury. (Code 1981, § 42-12-7.2, enacted by Ga. L. 1999, p. 847, § 3; Ga. L. 2000, p. 136, § 42.)

**Effective date.** — This Code section became effective July 1, 1999.

**The 2000 amendment,** effective

March 16, 2000, part of an Act to revise, modernize, and correct the Code, revised punctuation in this Code section.

**Law reviews.** — For note on 1999 enactment of this section, see 16 Ga. St. U.L. Rev. 219 (1999).

## 42-12-8. Appeals.

### JUDICIAL DECISIONS

**Applicability.** — This section applied to an appeal in a case filed in a trial court before its effective date and in which there was no appealable judgment entered until after the effective date. *Day v. Stokes*, 268 Ga. 494, 491 S.E.2d 365 (1997).

Direct appeal by an incarcerated woman from a parental termination order in an action filed by the Department of Human Resources was proper since the requirement of this section to use discretionary appeal procedures applies only where the appellant is a prisoner or former prisoner appealing from an action that was filed by the appellant when he or she was a prisoner. *In re K.W.*, 233 Ga. App. 140, 503 S.E.2d 394 (1998).

Discretionary application requirement of Georgia Prison Litigation Reform Act, O.C.G.A. § 42-12-8, was inapplicable to an injured party's renewed personal injury suit because the injured party was not a prisoner when the de novo action was filed. *Baskin v. Ga. Dep't of Corr.*, 272 Ga. App. 355, 612 S.E.2d 565 (2005).

After the Sentence Review Panel reduced the sentences imposed on an inmate convicted of aggravated assault and false imprisonment, it was found that the Panel did not have the statutory authority to reduce the false imprisonment sentence, and a writ of mandamus was issued requiring the Department of Corrections

to enforce the original sentence; the inmate's appeal from the denial of the inmate's motion to set aside the judgment granting the writ was subject to O.C.G.A. § 42-12-8, so the inmate had to pursue a discretionary, rather than direct, appeal. *Griffin v. Keller*, 278 Ga. 878, 608 S.E.2d 221 (2005).

**Prisoner's failure to comply with discretionary appeal procedures** in appealing from the trial court's denial of prisoner's pro se petition for mandamus required dismissal of the action. *Jones v. Townsend*, 267 Ga. 489, 480 S.E.2d 24 (1997).

Fact that defendant was a prisoner invoked O.C.G.A. § 42-12-8, which set forth appellate procedural requirements under the Prison Litigation Reform Act, O.C.G.A. § 42-12-1 et seq.; thus, the defendant was required to pursue discretionary, rather than direct, review of a trial court's ruling denying the defendant's petition for a writ of mandamus. *Harris v. State*, 278 Ga. 805, 606 S.E.2d 248 (2004).

**Cited in** *Hall v. Linahan*, 225 Ga. App. 439, 484 S.E.2d 65 (1997); *Serpentfoot v. Salmon*, 225 Ga. App. 478, 483 S.E.2d 927 (1997); *Moulder v. Reilly*, 226 Ga. App. 608, 487 S.E.2d 142 (1997); *Thompson v. Reichert*, 318 Ga. App. 23, 733 S.E.2d 342 (2012).

## CHAPTER 13

### INTERNATIONAL TRANSFER OF PRISONERS

Sec.

42-13-1. Short title.

42-13-2. Compliance with treaty by Governor or designee.

**Effective date.** — This chapter became effective July 1, 2002.

#### **42-13-1. Short title.**

This chapter shall be known and may be cited as the “International Transfer of Prisoners Act.” (Code 1981, § 42-13-1, enacted by Ga. L. 2002, p. 669, § 1.)

#### **42-13-2. Compliance with treaty by Governor or designee.**

When a treaty is in effect between the United States and a foreign country providing for the transfer of convicted criminal offenders to those foreign countries of which such offenders are citizens or nationals, the Governor or the Governor’s designee is authorized, subject to the terms of the treaty, to act on behalf of the State of Georgia and to consent to the transfer of such convicted criminal offenders. The Governor or his or her designee is authorized to develop policies, procedures, and processes to implement the provisions of this Code section. (Code 1981, § 42-13-2, enacted by Ga. L. 2002, p. 669, § 1.)











